SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original
Record from U.S.D.C. for the Eastern District of Pennsylvania	
Appellant's Appendix	
Relevant Docket Entries	1a
Grand Jury Presentment	2a
Testimony (November 3, 1950)	10a
Discussion	10a
Jacob Heffler—	
Direct Examination	18a
Cross-Examination	30a
Ira Hirschberg—	
Direct Examination	30a
Irving Greenberg—	
Direct Examination	37a
Cross-Examination	37a
Max H. Goldschein—	
Direct Examination	45a
Discussion	53a

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 18, 1952.

APR 30 1954

205659

Record from U.S.D.C. for the Eastern District of Pennsylvania—Continued
Appellant's Appendix—Continued
Excerpts from Testimony of Previous Hearings: Page
October 9, 1950 ..... 71a
October 17, 1950 ..... 99a
October 18, 1950 ..... 102a
October 19, 1950 ..... 109a
October 20, 1950 ..... 112a
October 23, 1950 ..... 121a
October 30, 1950 ..... 145a
October 31, 1950 ..... 149a
November 1, 1950 ..... 157a
Defendant's Exhibit I 196a
Judgment 199a
Appendix to Appellee's brief 203
Appellant's additional appendix 213
Proceedings in U.S.C.A. for the Third Circuit 234
Opinion, Maris, J. 234
Judgment 241
Clerk's certificate ..... (omitted in printing) 242
Order setting case for reargument 242
Order allowing certiorari 242
Mandate 243
Further proceedings in U.S.C.A. for the Third Circuit 245
Opinion, Maris, J. 245
Judgment 248
Clerk's certificate ..... (omitted in printing) 248
Order allowing certiorari 249

APPELLANT'S APPENDIX.

RELEVANT DOCKET ENTRIES.

Nov. 1, 1950.	Presentment, filed.
Nov. 3, 1950.	Trial—witnesses sworn. C. A. V. (Ganey, J.)
Nov. 6, 1950.	Transcript of testimony, filed.
Nov. 6, 1950.	Motion (dated Nov. 1, 1950) to continue trial filed.
Nov. 8, 1950.	In open Court: The Court adjudges defendant guilty of contempt.
Nov. 8, 1950.	Sentence: Imprisonment for five months. (Bail pending appeal fixed in the sum of $10,000.)
Nov. 8, 1950.	Defendant's Notice of Appeal filed. 11/8/50 Copy to Max H. Goldschein.
Nov. 8, 1950.	Copy of Clerk's statement of docket entries, filed.
Nov. 8, 1950.	Bond on Appeal of defendant in $10,000. with surety, filed.
Nov. 10, 1950.	Motion to Discharge Irving Greenberg as a witness before the Federal Grand Jury transferred from Miscellaneous No. 1411, and filed. (Denied by Ganey, J., 10/31/50)
Nov. 10, 1950.	Defendant's motion for production of documentary evidence, filed. (filed with Court 11/1/50)
Nov. 10, 1950.	Defendant's motion to dismiss presentment, filed. (filed with Court 11/1/50)
Nov. 10, 1950.	Judgment and Commitment, filed.

GRAND JURY PRESENTMENT.

The Grand Jury of the United States of America for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania duly impaneled and sworn on September 14, 1950 upon their oath present:

That on the 14th day of September, 1950 they undertook an inquiry concerning frauds upon and conspiracies to defraud the Government of the United States, involving violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses.

In pursuance of such inquiry it became necessary for said Grand Jury to inquire into and ascertain the facts from various and sundry witnesses who appeared before said Grand Jury, and others who have been and will be subpoenaed to appear and testify.

In accordance therewith, IRVING GREENBERG was subpoenaed to appear as a witness before said Grand Jury on October 2, 1950 and then and there refused to answer certain questions propounded to him, he claiming that his answers thereto may tend to incriminate him for the violation of a federal statute. Thereafter, on October 9, 1950, he appeared with his counsel before the Honorable J. Cullen Ganey, United States District Judge for the Eastern District of Pennsylvania, in open court, where the claim of privilege of the said witness, IRVING GREENBERG, was challenged by the Government. The Court heard the questions propounded to the witness and the answers he made thereto. Thereafter, on October 16, 1950, the Court, after hearing argument of counsel for the witness, found that there was no real and substantial danger of incrimination to the said witness, IRVING GREENBERG, and ordered him to return before the grand Jury and answer the said questions which he had refused to answer, namely:

1. Q. Are you in the numbers business now?
2. Q. Are you in the bookmaking business?
3. Q. Did you during the past year (1950) operate a bookmaking establishment?
4. Q. Do you take bets on sports events?
5. Q. And that is all you know about the numbers business, what you read in the newspaper or what somebody told you?
6. Q. Do you know an address 1133 West Diamond Street?
7. Q. Do you know whether there is a tailor shop there?
8. Q. Is that a cleaning and pressing shop at that address?
9. Q. Do you know a man by the name of L. J. Perry?
10. Q. Did you ever meet Willie Weisberg there?
11. Q. Did you ever meet Cappy Hoffman there?
12. Q. Do you drive your own automobile?
    A. Yes, sir.
13. Q. What kind?

Further, the Grand Jury presents that on the 17th day of October, 1950 the said IRVING GREENBERG was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection with the matters hereinbefore described, and again each of the said questions hereinabove listed, which the Court ordered him to answer, were asked of the said witness, who then answered some of the questions hereinabove set forth, but persistently refused to answer other of said questions, as well as additional questions, propounded to him, all as hereinafter set forth, stating categorically that he refused to answer each of the questions on the ground that it would tend to incriminate him.

Thereafter, on the 30th day of October, 1950 the witness, IRVING GREENBERG, again appeared with his counsel before the Honorable J. Cullen Ganey, United States Dis-

trict Judge for the Eastern District of Pennsylvania, in open court, where the claim of privilege of the said witness was again challenged by the Government. The Court heard the questions propounded to the witness and the answers he made thereto. The Court, after hearing argument of counsel for the witness and for the Government again found that there was no real and substantial danger of incrimination to the said witness, IRVING GREENBERG, and ordered him to return before the Grand Jury and answer the said questions which he had refused to answer, namely:

1. Q. *Are you in the numbers business now?*
*A. I refuse to answer that question, and the reason I refuse to answer that question, ladies and gentlemen of this Grand Jury, is that I have refused to answer this question previously. My reason for my refusal to answer this question is because the answer I would give you will tend to incriminate me of a violation of the Federal Criminal Statutes. I believe that my testimony before this Grand Jury will incriminate me. Therefore I claim my privilege, under the Fifth Amendment to the United States Constitution not to give evidence against myself. I also invoke the quasi judicial protection of the Attorney General and his deputies as well as the judicial protection of the Court. I will not now, or hereafter, waive my right not to incriminate myself, and nothing I say or do is a waiver of that right. In the event that, having claimed this right, I am further questioned, or in the event that I am directed to answer further questions by the Deputy Attorney General, or the Grand Jury, or the Court, I shall claim, when and if the occasion arises, the right to stand on my consti-

Note: Underscoring [italics] indicates questions witness refused to answer.

* Added by order of the Court.

tutional rights and not to give evidence or testimony against myself that would tend to incriminate me in a violation of any Federal Criminal Statutes. My refusal to answer the question is respectfully based upon the additional reason that this question is not relevant to the inquiry being conducted by this Federal Grand Jury.

2. Q. *Now, did you, during the past year, operate a bookmaking establishment? That is the past year, 1950, Mr. Greenberg?*

*A. I refuse to answer——

2a. Q. Now, are you going to repeat that statement again?

A. Yes, I would like, if you don't mind, to get it on the record. It will only be a second.

2b. Q. You mean you are going to read the whole thing you just read?

A. It will only take two seconds, the whole thing, and I would like to get it on the record.

2c. Q. Well, just consider that the objection that you just made to the previous question is also made to this question.

4. "Q. Business?

"A. Yes."

Then you were asked:

5. "What business?"

6. Q. The question that you refused to answer was, "Do you know any number writers around there (1133 West Diamond Street) men who are in the numbers business," and you answered, "Yes". Then I asked you *"Who"* and you said you wanted to consult with your counsel.

7. Q. Have you consulted with your counsel?

A. Yes, sir.

---

* Added by order of the Court.

8. Q. What is your answer?
   A. *I refuse to answer this question because it will incriminate me, and I stand on my Constitutional rights* * * *".
9. Q. Now then, I asked you, "Do you make regular calls from that telephone, since 1950?" All my questions relate to 1950. You answered "Yes". Then I said "Do you use that phone in connection with your business (at 1133 West Diamond Street) and you refused to answer that question.
   A. I am ready to answer it now, sir.
10. Q. Well, what is your answer?
    A. Not for my lawful business.
11. Q. *Do you use it for any other business?*
    A. *Well, I refuse to answer the question because it will incriminate me and I stand on my Constitutional rights* * * *".
12. Q. The last question I asked you before you went out, Mr. Greenberg was this: "Is it your real estate business you use it for?"
    A. And I said "No".
13. Q. *And "What business do you use it for"* (referring to the telephone at 1133 West Diamond Street).
    A. *I refuse to answer the question because my answer will incriminate me. I stand on my Constitutional rights.*

Thereafter, on the same day, IRVING GREENBERG, pursuant to the order of the Court, was again called as a witness before said Grand Jury, whereupon the questions that the Court ordered the witness, IRVING GREENBERG, to answer were again propounded to said witness, and he contumaciously refused to answer said questions as follows:

Q. Mr. Greenberg, the question that you refused to answer was, "Do you know any number writers

around there,"—referring to 1133 West Diamond Street—"men who are in the numbers business?" And you answered "Yes". Then I asked you, "Who"? and you said you wanted to consult your counsel, and you have consulted with your counsel. Then you refused to answer that question, claiming your Constitutional right. The Court ordered you to answer that question. Will you answer it?

A. I refuse to answer the question because my answer will incriminate me, and I stand on my Constitutional rights • • •.

Q. Now, you were asked about the telephone at 1133 West Diamond Street. You were asked, "Do you use that phone in connection with your business?" and you refused to answer that question. The Court instructed you to answer. You said before the Grand Jury, "I am ready to answer it now, sir". And I said, "Well, what is your answer?" to which you answered, "Not for my lawful business."

A. Yes, sir.

Q. And you were then asked, "Do you use it for any other business?" and you refused to answer that question, and the Court has instructed you to answer. What is your answer?

A. My answer to that question—will you repeat the question, please?

Q. Do you use it for any other business?

A. And you want my answer now?

Q. Yes.

A. My answer is, not for my lawful business. I refuse to answer that question further, because my answer further will incriminate me, and I stand on my Constitutional rights • • •.

Q. Now, when you were before the Grand Jury earlier today, I asked you a question, "The last question I asked you before you went out, Mr. Greenberg, was this: 'Is it your real estate business you use it

for?'" Talking about the telephone at 1133 West Diamond Street. You answered, "And I said, 'No.'" Then I asked you, "And what business do you use it for?" and you refused to answer it. Now, the Court has instructed you to answer that question. Do you recall that?

A. Yes, sir. The question is, what business did I use the telephone for?

Q. What business do you use it for?

A. Not for my lawful business. I refuse to answer further because my answer further will incriminate me, and I stand on my Constitutional rights * * *.

That the Grand Jurors, upon their oath, present that IRVING GREENBERG, a witness before this Grand Jury, has refused to answer the aforesaid questions propounded to him before said Grand Jury: that each of said questions was proper and material to the Grand Jurors' inquiry and that no one or all of said questions would tend to incriminate the said witness for the violation of a Federal Statute.

The Grand Jury, therefore, charges that the said witness, IRVING GREENBERG, has given obstructive and contumacious answers to each of the questions propounded to him before the said Grand Jury and he has willfully, deliberately and contumaciously shut off and blocked the search for truth, thwarted the investigation of this Grand Jury in the matter hereinbefore set out, and obstructed the administration of justice.

That the said witness, IRVING GREENBERG, has willfully, deliberately and contumaciously disobeyed and resisted the lawful order and command of this Honorable Court by willfully and deliberately refusing to obey the Order of this Court to answer before the Grand Jury the aforesaid questions.

The Grand Jury, therefore, respectfully prays this Honorable Court to invoke its punitive power against the said witness, IRVING GREENBERG, to preserve the authority

and vindicate the dignity of the Court in order to maintain the proper functioning of the Court and the Grand Jury, and that this Honorable Court exercise its authority so that its power to punish may serve as a deterrent to other recalcitrant witnesses, who may be inclined to obstruct the business of this Grand Jury.

LEVI C. HERSHEY,
Foreman.
GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.

M. H. GOLDSCHEIN,
Special Assistant to the Attorney General.
JUSTINUS GOULD,
Special Assistant to the Attorney General.
DREW J. T. O'KEEFE,
Special Assistant to the Attorney General.
VINCENT P. RUSSO,
Special Assistant to the Attorney General.

TESTIMONY.

[1] Philadelphia, Pa., Friday, November 3, 1950.

Before Honorable J. CULLEN GANEY, *J.*

Present: MAX H. GOLDSCHEIN, ESQ., Special Assistant to the Attorney General, for the Government.
JACOB KOSSMAN, ESQ. and MORTON WITKIN, ESQ., for Irving Greenberg.

[2] THE COURT: All right, did you want to say something, Mr. Goldschein?

MR. GOLDSCHEIN: No, sir; I understand Mr. Witkin has a motion, or by Mr. Kossman.

MR. WITKIN: Will Your Honor just indulge me a second?

THE COURT: Before that, I am denying the witness' motion to continue the contempt trial. I have ruled on the motion to discharge and on the motion to dismiss the presentment.

MR. KOSSMAN: Exception.

THE COURT: All right.
What is this motion now?

MR. WITKIN: No motion, ready for the contempt trial.

THE COURT: I direct that Irving Greenberg be brought to the bar of the court.

Mr. Greenberg, the Grand Jury has returned a presentment against you in which the presentment alleges that five questions were asked you which you refused to answer. They were as follows:

"Are you in the numbers business now?" You refused to answer that question.

MR. WITKIN: May I ask Your Honor to take them [3] one at a time because he is going to answer one of those questions.

THE COURT: All right. I am just going to ask him now whether he refused to make these answers in the Grand Jury room, that is the question.

"Are you in the numbers business now?" and you refused to answer that question on the ground that your privilege under the Fifth Amendment would be violated if you answered.

The second question was:

"Now, did you during the past year operate a bookmaking establishment, that is the past year, 1950, Mr. Greenberg?" and you refused to answer it on the same ground.

MR. WITKIN: I don't want to interrupt Your Honor—if Your Honor please, after going into the matter quite thoroughly and trying to expand the rubber band in our own opinion as far as possible the witness is prepared to answer that question, and his answer would be no. We take it that the bookmaking business is a different business and not meant to be the same as the number business, and his answer to that question would be no.

MR. GOLDSCHEIN: That will be eliminated.

THE COURT: All right, the second question is omitted. [4] The third question asked you before the Grand Jury was; the question that you refused to answer,

"Do you know any numbers writers around there, 1133 West Diamond Street, men who are in the numbers business?"

MR. WITKIN: We answered that.

THE COURT: "You answered 'yes,' and then I asked you 'who' and you said you wanted to consult with counsel."

"Have you consulted with your counsel?"

"Yes, sir."

"What is your answer?"

"I refuse to answer this question because it will incriminate me and I stand on my Constitutional rights."

And the next question was——

MR. GOLDSCHEIN: "Do you use it for any other business," referring to the phone at 1133 West Diamond Street.

THE COURT: "Do you make regular calls from that telephone since 1950?"

Well, I will read it all:

"Do you make regular calls from that telephone?"

"Yes."

"Then I said——"

MR. WITKIN: What page?

THE COURT: Page 4. "Then I said, 'Do you use [5] that phone in connection with your business at 1133 West Diamond Street?' and you refused to answer that question."

"I am ready to answer it now, sir."

"Well, what is your answer?"

"Not for any lawful business."

MR. WITKIN: "Not for my lawful business."

THE COURT: "Not for my lawful business," that is right.

"Do you use it for any other business?" and the answer is, "Well, I refuse to answer the question," and there again you claimed your Constitutional privilege.

MR. WITKIN: Except, may I direct Your Honor's attention that that answer, "I refuse" must be taken together with the answer that was made before; he did answer it "Not for my lawful business."

THE COURT: I read it, it is all in the record. "Do you use it for any other business?" and the answer, he refused

to answer the question because it will incriminate him, that is the refusal.

And "What business do you use it for?" referring to the telephone at 1133 West Diamond Street, and there again your answer was "I refuse to answer the question because my answer will incriminate me. I stand on my Constitutional rights."

[6] Now, those questions were asked you in the Grand Jury and you have refused to answer them, is that correct?

(Mr. Greenberg at the bar.)

MR. GREENBERG: Yes, sir.

THE COURT: There are four in number.

MR. KOSSMAN: If the Court pleases, I respectfully call attention to the fact that even in the presentment itself he has answered that question, those phone questions on page 6.

Mr. Goldschein asked six times the same question and he answered on page 6—"What business did I use the telephone for? Not for my lawful business."

"Do you use it for any other business?"—that is in the middle of page 6, which is the same on page 4½; in other words from 4½ to 6, two and a half pages are just devoted to those questions about the phone, and in there are the answers.

There are, therefore, only three questions pending before the Court.

MR. GOLDSCHEIN: No, four.

THE COURT: No; he says, as you get down to the end of page 6, "The question is, what business did I use the telephone for?"

"What business do you use it for?"

[7] "Not for my lawful business. I refuse to answer further because my answer will incriminate me, and I stand on my Constitutional rights." and that is the question

which I pose here at the end, or was posed to him here at the end of page 4. I think that is right.

Now, you say those are the questions you were asked in the Grand Jury room?

The burden here shifts to the defendant. What is your wish here, gentlemen?

MR. WITKIN: I'd like to proceed with our trial.

THE COURT: All right.

MR. WITKIN: Will Your Honor indulge with me as I go through these papers, I have got so many of them——

I ask that the notes of testimony taken in the previous hearings, and I have given the pages and the dates of the hearings, and am handing Your Honor a copy, be made part of this record. I do that for the purpose of saving both the Court as well as counsel a great deal of time; and of course if Your Honor wants me to read the contents of those various pages and of the exact matters that we are putting into evidence I shall do so, but I am perfectly satisfied to just leave it and then the Court can examine the pages if they want to.

[8] MR. GOLDSCHEIN: Do I understand the transcript of the record in this court on this issue?

MR. WITKIN: Yes, that is right.

MR. GOLDSCHEIN: It is part of the record anyway.

MR. WITKIN: Except that I feel that we have to offer it at this time.

THE COURT: All right.

MR. WITKIN: I take it that that is admitted, and I will hand the stenographer the pages.

(A list of the pages of testimony, and dates, taken in previous hearings follows:

October 9, pages: 132-135, 166, 173, 175-187, 191-194, 202-210, 214-218.

October 17, pages: 307-310.
October 18, pages: 312, 313, 329-332, 339, 341, 345.
October 19, pages: 390-393.
October 20, pages: 405-408, 427-428, 436, 454-455, 458, 471-472.
October 23, pages: 505-530, 532-536, 544-545.
October 30, pages: 628, 632, 635-637.
October 31, pages: 2-12 (652-662).
November 1, pages: 664-718.)

(Copies of the above-mentioned pages follow on the succeeding pages.) [See pp. 71a to 195a, infra.] (Pages 9 to 178, inclusive, of this record. The original page numbers appear to the left of the double red line at the top of the page.)

[179] MR. WITKIN: Now, in the course of the trial Your Honor asked us to point out any regulation dealing with the requirement under the law, and we were referring to the year 1950, wherein a person who had employees had to file a Social Security return at a particular time, to wit, at the end of any particular quarter. And while all this is contained in the law, and, naturally, I assume the Court must take cognizance of the law, I particularly offer in evidence and direct Your Honor's attention, and I hand Your Honor a copy of that section, "Section 402, 601, of Regulation 106 of the United States Treasury Department, Bureau of Internal Revenue, relating to employees' tax and employer's tax under the Federal Insurance Contribution Act; and also Section 402 and Section 602. I offer that in evidence.

MR. GOLDSCHEIN: Is that a statute?

MR. WITKIN: Well, Mr. Goldschein, technically you are correct. Instead of saying "I offer in evidence" I should say that I specifically direct the Court's attention to that particular phase of the statute.

Then, may it please Your Honor, I similarly direct Your Honor's attention and ask that by reference it be

noted in this record, to the following documents dealing with withholding tax and Social Security, and I particularly direct Your Honor's attention to Regulations 106 in their entirety——

[180] MR. GOLDSCHEIN: Do you have a copy of that?

MR. WITKIN: No, this is a book.

And, in order that Your Honor may be able to pick out the sections more readily that we refer to, particularly in this case, I have had them taken out of the text and prepared, and shall hand Your Honor a copy. The papers that I suggest be marked Exhibit A, consisting of four typewritten pages, are excerpts taken from Regulations 106. And, while we do not limit ourselves to the ones that we handed up as Exhibit A, and rely upon the entire Regulations 106, we have made our utmost effort to include into those regulations which become a part of the statute, and therefore subject to the civil and criminal penalties, the sections that we think will enable the Court more readily to see what we are driving at.

(Excerpts from Regulations 106 were marked Exhibit A.)

Then, also, may it please Your Honor, we similarly do that, and direct the Court's attention to Regulations 116, and that deals with withholding tax, and again, in similar manner, and for similar purpose, without reiterating them, we ask that it be marked Exhibit B, and hand up to Your Honor those sections that we think are particularly applicable, more particularly to our case.

[181] (Paper containing Regulations 116 marked Exhibit B.)

MR. WITKIN: Then, may it please Your Honor, assuming that the caption can be removed, to whom it is directed —but a witness who is here, Jacob Heffler, whom we will qualify, has handed to me, dated November 2—and I take it that the fact that it was addressed to Mr. Kossman and

me can be deleted, and only the sections starting with Chapter 9 of Title 26 be made part of the record, and leaving out at the bottom, "Respectfully submitted"—and I hand Your Honor a summary, without, of course, limiting ourselves that they are all, but for the convenience of the Court, of the criminal penalties applicable to the regulations and the statute to which I referred, and ask that that be marked Exhibit C.

(Paper containing summary of Chapter 9 of Title 26 was marked Exhibit C.)

MR. WITKIN: And the first one I have handed up to you, and we haven't marked, so I guess we ought to mark that Exhibit D.

(Paper containing copy of Section 402.601, of Regulations 106 of the United States Treasury Department, Bureau of Internal Revenue, was marked Exhibit D.)

MR. GOLDSCHEIN: May it please the Court, I object to the introduction of this letter, Exhibit C——

[182] MR. WITKIN: I don't offer the letter; I only offer from here on, from Chapter 9. I purposely deleted that part. In other words, only from Chapter 9 on.

THE COURT: Well, there is no jury. I will take into consideration it is a letter.

MR. WITKIN: We should have it the other way, but we don't.

Also, may it please Your Honor, by reference I direct Your Honor's attention particularly to Title 26 of the Internal Revenue Code, Chapter 9, and particularly to Sections 1625 (a) and (b).

THE COURT: I know the sections; they are easy to find.

MR. WITKIN: I have them here, if Your Honor will bear with me.

I hand up Sections 1625 (a), (b) and (c), and then specifically refer to, and I shall hand up later—I don't seem able to locate it amongst my papers now—the copies of 1626 (a), (b), (c) and (d); and also 1627, Section 1627, as well as 145 (a), (b) and (c).

I will ask that this last one be marked Exhibit E—that is Section 1625.

(Paper containing copy of Section 1625, Title 26 of the Internal Revenue Code, Chapter 9, was marked Exhibit [183] E.)

Mr. Witkin: And here is 1627, which I will ask be marked Exhibit F.

(Paper containing copy of Section 1627, Title 26 of the Internal Revenue Code, Chapter 9, was marked Exhibit F.)

Mr. Witkin: And also Section 1626.

(Paper containing copy of Section 1626, Title 26 of the Internal Revenue Code, Chapter 9, was marked Exhibit G.)

---

[184] JACOB HEFFLER, having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Witkin:

Q. Now, Mr. Heffler, what is your business?

A. I am a certified public accountant.

Q. Without being either modest or immodest, will you please qualify yourself as an expert on tax matters, if you can, and the length of time that you have been a certified public accountant, with whom you have been associated, and let His Honor have all the details so that His Honor knows something about it.

THE COURT: I know Mr. Heffler well and favorably. He merits the highest confidence of this Court. You needn't qualify him.

THE WITNESS: Thank you.

By MR. WITKIN:

Q. Mr. Heffler, I will ask you this hypothetical question. Assuming that Irving Greenberg since January 1, 1950, to the present time was engaged in an unlawful business for profit, other than his lawful business, and assuming that this unlawful business required employees, was Irving Greenberg obliged under the Internal Revenue Laws of the United States and the regulations thereunder and the laws of the United States [185] relating to the Federal Insurance Contributions Act to have made during the year 1950 at certain stated intervals which have already since passed until the present time deductions from these employees' wages the employer's contributions based on the wages of the employees and to have made quarterly federal returns for such monies withheld to the Collector of Internal Revenue during the year 1950 from January 1 until the present time?

A. Yes.

MR. GOLDSCHEIN: Just a minute. We are objecting to that question, may it please the Court. He is basing his whole hypothetical question—it isn't based on any fact in issue before this Court at the present time, one, and two, the Court will determine as a matter of law whether the witness is compelled to comply with any particular statute or regulation of the Government, and no expert witness can tell the Court what the law is on any question. I think the Court knows what the law is and will follow the law as it is written, including the regulations of the department as published.

MR. WITKIN: May it please Your Honor, in answer to Mr. Goldschein, his number one objection, there is basis in the testimony of this case as to the fact that

this witness is engaged in a business other than his lawful business. As a matter of fact——

[186] THE COURT: Yes, but now, there is nothing in the question as posed which warrants, which finds warrant in the record that he has employees, but I will hear the answer to this question and I will take it subject to that objection, unless there would be some later de-development, so we will save time here. I will take it subject to the Government's objection, which seems to me at the moment to be well taken, but I will hear it.

MR. GOLDSCHEIN: The second objection, may it please Your Honor, this witness is giving Your Honor an opinion on the law.

THE COURT: Well, it may well be to that extent, but I suppose it is offered to show that he is in fear of immediate apprehension of danger since a certified public accountant has told him and his counsel has told him that. That is in the record, and I don't know why we shouldn't have particularly what an accountant thinks the law to be.

MR. GOLDSCHEIN: That part of my objection—I am objecting to this man coming into the court room and telling the Court what the law is on that question.

MR. KOSSMAN: Lawyers do that every day.

By THE COURT:

Q. What is your answer?

THE COURT: I will take this subject to the [187] objection solely to save time.

A. Yes, Your Honor.

THE COURT: The answer is yes.

By MR. WITKIN:

Q. Were I to substitute for the words "unlawful business", "the numbers business", and repeat the question

identically as I have the preceding question, would your answer be "Yes"?

MR. GOLDSCHEIN: Just a minute. The same objections to that question.

MR. WITKIN: Pardon me.

By MR. WITKIN:

Q. Would your answer still be "Yes"?

A. Yes.

Q. Now, you have been in consultation with myself, with Mr. Kossman, and with Mr. Irving Greenberg, have you not?

A. Yes, sir.

Q. Was it your opinion and did you offer to us as your opinion as well as to Irving Greenberg that if Mr. Irving Greenberg was in either the number business or an unlawful business and didn't file these returns that he would be making such an admission such as would tend to incriminate himself?

MR. GOLDSCHEIN: The same objection.

THE COURT: Exception.

A. Yes.

[188] By MR. WITKIN:

Q. Now, I am asking you the same question, and I guess it would be easier to repeat it, dealing with the withholding tax. Assuming——

MR. GOLDSCHEIN: I will object further that this witness is undertaking to assume the role of a Constitutional expert and advising the witness on whether or not it would or would not tend to incriminate him for the violation——

MR. WITKIN: The Circuit Court of Appeals, Mr. Goldschein, has ruled in the case of a certified public accountant even without a lawyer, if he relied upon the advice of a certified public accountant, he had a right

to rely on it and wouldn't be guilty of a criminal offense.

By Mr. Witkin:

Q. Assuming that Irving Greenberg since January 1, 1950, to the present time was engaged in an unlawful business or in the numbers business, and I should have added after the word "business" "for profit", other than his lawful business, and assuming that this unlawful business required employees, was Irving Greenberg obliged under the Internal Revenue laws of the United States and the regulations thereunder and the laws of the United States relating to the Federal Income Tax Withheld From Wages Act, to have withheld during the year 1950 from [189] January 1 until the present time from the wages of the employees moneys due the United States Government and to have made quarterly federal returns from such moneys to the Collector of Internal Revenue?

A. I will have to qualify that by saying yes.

Q. What is your answer, first? Can you answer it first?

Mr. Goldschein: Objection.

The Court: Taken subject to the Government objection.

A. Yes, in the event that he had one or more employees who received sufficient wages to offset the amount of money that is originally given and the first single exemption plus an amount that is allowed for the additional exemptions.

Q. In other words, paraphrasing it more simply, if I may, and if I am correct, that is provided that all of the employees wouldn't have been exempt?

A. That is correct.

Q. In other words, if there were any employees who would not have been exempt, then you have to file a withholding tax?

A. That is correct.

Q. If all the employes were exempt, then of course they do not have to pay the withholding tax.

A. That is correct.

Q. That exemption depends upon the amount of earnings—[190] depends not only upon the amount of earnings but rather upon the amount of dependents rather than upon the amount of earnings.

A. That is correct.

Q. I again ask you the question if you were in conference with Mr. Greenberg and myself and Mr. Kossman and it was your opinion and your advice to Mr. Greenberg as well as to us that in your opinion as a tax expert that were Mr. Greenberg to admit that he had such employees and he did not pay the withholding tax, that he would be incriminating himself?

A. He would be subject to criminal——

MR. GOLDSCHEIN: Just a minute. The same objection, and for the further objection there is no specification as to the time when this expert met with Mr. Kossman for consultation.

THE COURT: Can you localize it as to time of these consultations?

By MR. WITKIN:

Q. The conferences Mr. Goldschein has asked you to localize—your first conferences were with Mr. Jacob Kossman, were they not?

A. Yes, sir.

Q. And they extend back——

MR. GOLDSCHEIN: Now, may it please the Court, [191] I am objecting, and I think we ought to eliminate the expert's conferences with Mr. Kossman. I think we ought to limit it to the expert, if it is admissible at all——

MR. KOSSMAN: Is it because you think it is superfluous?

MR. WITKIN: May it please the Court——

THE COURT: Just a moment. Mr. Goldschein has the floor.

MR. GOLDSCHEIN: We are further objecting, may it please the Court, this Court isn't interested and it doesn't help any of the issues in this case for this expert to go on and tell how many conferences he had with Mr. Kossman or with Mr. Witkin.

THE COURT: Yes, I think that certainly is well taken. If the witness was there——

MR. WITKIN: Will Your Honor permit me to answer before Your Honor rules?

THE COURT: Yes.

MR. WITKIN: If Your Honor pleases, Mr. Goldschein is in error for this reason. If this witness in his conferences with Mr. Kossman related his opinions to Mr. Kossman and Mr. Kossman then related the opinions of Mr. Heffler to Mr. Greenberg and myself, then it certainly would show that this witness——

[192] THE COURT: All right, but let us get on the record then, if you will, and I will take it subject to counsel's objection—I give no indication one way or the other as to the proper situation now—whether it got to Mr. Greenberg.

MR. WITKIN: We will show that.

By MR. WITKIN:

Q. You originally had conferences with Mr. Kossman, did you not?

A. That is correct.

Q. They date back how long?

A. On Tuesday.

Q. On Tuesday?

A. Tuesday of this week.

Q. Tuesday of this week. That is the 31st of October?

A. That is correct.

Q. Then you had conferences with Mr. Witkin and Mr. Kossman?

A. That is correct, sir.

Q. Then yesterday you had conferences with Mr. Witkin, Mr. Kossman and Irving Greenberg?

A. That is right.

Q. So that to get the record to show it, your conferences were subject to the last appearance of Irving Greenberg before the Grand Jury?

[193] A. That is true.

Q. Which was on October 30.

MR. WITKIN: May I ask Mr. Goldschein whether he will agree that this question and this answer of Irving Greenberg, and I put it in at this time because I think it would be more in order, took place; instead of reading it into the record before the Grand Jury, I will show it to Mr. Goldschein first.

It is agreed, and I offer as part of the record in this case that before one of the sessions of the Grand Jury Mr. Irving Greenberg was asked this question:

"Well, will you tell us what you know about the numbers business?"

And at inter alia his answer was as follows:

"The number business is a game of chance. People bet on a number consisting of three digits. The winning number is taken from either the horse track results or the stock market results. If the three digits hit as bet the player wins and vice versa. In the number business there are bankers. The people who work for the bankers——"

MR. GOLDSCHEIN: Before you get any further, will you stop there? We are not objecting to this; but we are not agreeing that by virtue of this we are opening the door to [194] any other——

THE COURT: I understand.

MR. GOLDSCHEIN: —intrusion of the Grand Jury transcript.

MR. WITKIN: "And people who work for the bankers; who, among other duties, compute the records as turned in by the pickup men and the number writers."

By MR. WITKIN:

Q. Now, Mr. Heffler, my associate asked me to ask you this question. From the regulations that we handed up to His Honor, particularly those dealing with Social Security, and I think they were Sections 402-601, and 402-602, is it correct and from your experience must it be followed that the returns on Social Security and withholding tax must be made quarterly during the year, the current year?

[195] MR. GOLDSCHEIN: We are objecting to that, may it please the Court; I don't think this witness is in any position to tell the Court what the law is.

THE COURT: We will hear it subject to objection.

By MR. WITKIN:

Q. And it is also true, is it not, that as of the year 1950 the Social Security and the withholding tax return form are on one and the same form?

A. Yes, sir.

MR. GOLDSCHEIN: Objection.

By MR. WITKIN:

Q. So when you filed the one——

THE COURT: I will give you an exception so the record will be clear on it; subject to the objection of counsel.

By MR. WITKIN:

Q. —on one form, and when you file the one you must of necessity file the other?

A. Form 941.

MR. WITKIN: Cross-examine. Wait a minute, just one second.

By MR. WITKIN:

Q. Let me ask you another question.

If a person employed by, let's assume that "A" is employed by "B", and if "A" is paid a salary by way of [196] commissions only, is that considered, or is that person considered an employee within the rules and regulations of the Federal Social Security that I have referred to and the withholding tax?

MR. GOLDSCHEIN: I am objecting to that, may it please the Court, the difference between an independent contractor and an employee is of such a nature that certainly this witness wouldn't be competent to answer.

THE COURT: I think that is well taken.

MR. WITKIN: At the risk of asking the same question another way——

By MR. WITKIN:

Q. Let me put it to you this way——

MR. GOLDSCHEIN: Let us agree that its been asked and answered the same way.

MR. WITKIN: No, because it is a different question in my opinion.

By MR. WITKIN:

Q. If a man is engaged in the number business and persons work for him and return to him at the end of the day, for the sake of argument, ten dollars, and assuming that the commission for that ten dollars is one dollar on that ten, is that person in your opinion an employee?

MR. GOLDSCHEIN: Just a minute. We are objecting.

[197] MR. WITKIN: Wait until I finish the question.

By MR. WITKIN:

Q. Assuming that that is a week by week basis covering six days a week, and that that person constantly goes out, picks up that business, turns the money in to his

employer and receives the same commission day by day and week by week——

MR. GOLDSCHEIN: Just a minute. We are objecting for the same reason.

THE COURT: I couldn't possibly let that in; there is no semblance of that factual statement in the record.

MR. WITKIN: It is right in what I read, it is right in the record; I read here (indicating paper), may it please the Court.

THE COURT: If employees work six days a week?

MR. WITKIN: No, no, that is not it.

I will withdraw the question and reframe it.

By MR. WITKIN:

Q. If in the number business——

MR. GOLDSCHEIN: Before you start that over again. I am objecting to this witness distinguishing for the Court the difference between an employee and an independent contractor. I don't care what foundation is laid for it this witness is not competent to advise the Court on that question, nor would he if he were a lawyer. I think that is a matter of law for the Court to determine.

[198] By MR. WITKIN:

Q. Where a man works on a commission basis by receiving a commission from the money he turns in from sales that he makes for an employer is he an employee in your opinion?

THE COURT: I will hear it.

MR. GOLDSCHEIN: Just a minute..

THE COURT: Subject to your objection.

THE WITNESS: That has to be qualified; there are two types of——

MR. GOLDSCHEIN: I don't think this witness is qualified.

THE WITNESS: That has to be qualified.

THE COURT: All right, objection sustained.

MR. WITKIN: Will Your Honor grant me an exception?

THE COURT: Yes.

By MR. WITKIN:

Q. A person who computes records for an employer by working on an adding machine, and receives payment for that work, you would certainly consider that person an employee, wouldn't you?

MR. GOLDSCHEIN: Just a moment.

THE COURT: The objection is sustained.

MR. WITKIN: Will Your Honor grant me an exception?

[199] THE COURT: Yes.

MR. WITKIN: May I direct Your Honor's attention to the fact that it is now in the record that Irving Greenberg has testified that in the number business there are bankers who employ people who compute the records, which makes that person a computator. I am now asking this witness whether a person who computes records, although I think it is common sense, for another person in a business, is an employee.

THE COURT: The objection is sustained.

MR. WITKIN: Will Your Honor grant me an exception?

THE COURT: Yes.

MR. WITKIN: Cross-examine.

CROSS-EXAMINATION.

By MR. GOLDSCHEIN:

Q. Mr. Heffler, how long have you known Irving Greenberg?

A. I met him last night for the first time.

MR. GOLDSCHEIN: That is all.

(Witness excused.)

IRA HIRSCHBERG, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. WITKIN:

Q. Your name please?

[200] A. Ira Hirschberg.

Q. You are here in response to a subpoena issued by the District Court of the United States requesting that you bring with you Irving Greenberg's employers quarterly tax returns for the three quarters for the calendar year 1950, if any have been filed; also his Federal insurance contributions and tax returns, if filed, for the same period; and that this subpoena was issued on behalf of the defendant at bar, Irving Greenberg. Have you produced those records?

A. I must answer this way——

MR. GOLDSCHEIN: Let us qualify the witness and determine who he is first.

By MR. WITKIN:

Q. The subpoena was directed to Francis R. Smith, Collector of Internal Revenue. What position do you hold in the Department of Internal Revenue?

A. My position is Chief of the Legal Section of the Collector's office, and I have been delegated to appear on his behalf.

Q. Do you have charge of the records?

A. I have authority to answer for the Collector.

Q. I take it that you have not produced the records but you wish to make an explanation as to why you have not?

A. That is right.

MR. WITKIN: Is there any objection to that, [201] Mr. Goldschein?

MR. GOLDSCHEIN: No.

THE WITNESS: I must make the statement that under the regulations the Collector's office is prohibited from testifying with respect to records pertaining to taxpayers other than matters involving the enforcement of the Internal Revenue laws; I refer the Court and state as my authority Articles 80 and 81 of Regulations 12 for the observance of revenue and prohibition officers, district attorneys and marshals. That is a regulation which prohibits all Internal Revenue officers from testifying with respect to such matters being confidential under the law.

By MR. WITKIN:

Q. What would we have to do to get those records? You told me that there was something, somebody had authority to give them to us?

A. Article 81 prescribes a method of procuring copies of documents.

Q. Before you give us that——

MR. WITKIN: Mr. Goldschein, can we or can we not agree to the fact that Irving Greenberg has not filed any quarterly tax returns—and I am doing this in the interest of saving time—for the three quarters for the calendar year 1950 either for the Federal insurance contribution Act tax returns or for the Act dealing with withholding tax? [202] Otherwise I feel that I will have to make application to the Court to permit us to get that information from Washington.

I can say to you as an officer of this court that he has not, and if you take my word for it you will note that he hasn't. And I don't want to ask for any more delays, and I don't want to delay the proceedings, I am merely asking whether you can agree to that in the interest of saving time.

MR. GOLDSCHEIN: No, sir, I don't see that we can agree to that. I certainly don't know he hasn't; I don't think that counsel, unless he is in business with him or carries on his business, can know that fact.

MR. WITKIN: I only know it from what he told me.

MR. GOLDSCHEIN: I don't think that is competent.

MR. WITKIN: I agree with you, it is not, I agree with you thoroughly it is not. I will withdraw the request.

MR. GOLDSCHEIN: I want to go further. I think that if the witness—I am talking about Greenberg now, if Mr. Greenberg wanted a certified copy of his withholding tax or any other copy of any tax that he filed he can get a certified copy.

THE COURT: Why don't you get a certified copy?

MR. WITKIN: You can't get it if you don't file [203] it. We tried that. You can't get it if you don't file it, that is the position we are in.

By MR. WITKIN:

Q. What do we have to do; who has the authority to give it to us under your regulations?

A. The statement was just answered that you make application for it to the Collector. Every taxpayer is entitled to a return if he makes proper application in writing; and of course that would necessitate a search of the records to be absolutely sure that we can obtain the information, or it can be produced in this manner as provided by Article 81 of the regulations that I just referred to, which states——

THE COURT: We don't want to go into that now. You can give it to Mr. Witkin after adjournment here.

MR. WITKIN: Mr. Kossman insists on being heard.

MR. KOSSMAN: That is right.

If the Court please, in hundreds of war fraud cases that were tried here the Social Security records, even though not directly applicable, were brought into the courts and read off.

Now, under the law when a criminal prosecution is instituted by the Government they can not by claiming a privilege, which is only the most ethical philosophy embodied in judges' decisions, they can not by claiming a privilege [204] prevent the defendant from showing his innocence or the means of his innocence, and that is what Mr. Goldschein is trying to do, and that is just against the law.

Now, in that brief that I filed, with the opinion of Jerome Frank, in the Harvard Law Review, it states that it is a fact; it has been held in OPA records, it has been held in SEC records, and unemployment compensation records I don't know offhand or Social Security. But the basic fact is this, that when the Government institutes a criminal proceding—of course, if they don't it is a different proposition—then they cannot by hiding behind the privilege prevent a defendant, a citizen of this country, from showing his innocence or the means of his innocence; that would be the most immoral proposition expounded. To think that the case of a man's innocence is in his hands (indicating Mr. Goldschein) or in his hands (indicating witness) and they refuse, men who work for the Government——

[205] MR. WITKIN: Now, may it please Your Honor, I invoke, and move for the aid of the Court, to ascertain for and on behalf of the witness at bar, Irving Greenberg, the statement or the truthfulness—well, I will

withdraw that—the record from the United States Government as to whether or not he filed such Social Security returns during the year 1950, or withholding tax, and I invoke the aid of the Court for this reason. I believe it is in the interests of justice that it be done. It happens to be that there is a regulation that prohibits us, even though issuing a proper subpoena, from getting that record.

The knowledge of that fact is entirely within the hands of the witness, here, on the witness stand at the present time. He can procure that answer in very sort time, and return to this Court and advise the Court as to whether or not there were filed by Irving Greenberg any records. And I feel that it is a fair and proper appeal to the Court, because it is something exclusively within the possession of the Government.

I further suggest that it seems a little unfair, and I am not being critical in any way, on the part of Mr. Goldschein, representing the Government, not to join with us in that application, for this reason. I don't think the Government chooses to rely upon our being prevented by statute from [206] presenting the truth of a situation. He has his side of the case, and I don't expect him to help or assist me. But where he knows, or can at a moment's notice ascertain the correctness of the statement that I made as counsel, that during the year 1950 there were no such returns filed, it seems to me, taking the broad view of what a prosecutor is, that Mr. Goldschein, if he ascertains that that statement of mine is correct, ought to stipulate of record it is correct. Or, if he doesn't want to do that, it seems that, in fairness to this case, he ought not to oppose my invoking the aid of the Court in establishing that fact.

Mr. Goldschein: If Mr. Greenberg filed any tax returns, he can get a certified copy by making application to the Collector.

MR. WITKIN: Mr. Goldschein, you are begging the question, if I may address my remarks to you with the permission of the Court. When you say, "if he filed tax returns," we have told you he didn't. And therefore he——

MR. GOLDSCHEIN: I don't know whether he did or not.

MR. WITKIN: But we are asking you to find out and tell the Court whether we are correct or not.

We are invoking your aid in fairness to get the [207] facts exclusively within the knowledge of the United States Government of America. We say to you, sincerely and honestly, that we did not file—and this is not Greenberg's testimony, it is my statement—any Social Security returns, quarterly or otherwise, or withholding tax returns during the year 1950. If we did file, you are right, we could get a copy from the Government by asking for it. But we didn't. Now we are asking you whether you will ascertain whether that is correct, and advise us. Your answer to me that if we filed we could get it, is begging the question, Mr. Goldschein.

MR. GOLDSCHEIN: I will supplement my statement. There is nobody that knows better whether he did or didn't file than Mr. Greenberg. He is in the court room now. He can answer the question.

THE COURT: Yes. Let Greenberg take the stand if he didn't file. I won't compel the Government to do that. If they don't want to do it, I certainly will not tell them to.

By MR. WITKIN:

Q. Do you know of your own knowledge whether or not any such returns referred to have been filed?

A. I am not permitted to answer that question, sir, for the same reason.

Q. Well, are you permitted to answer the question whether you know?

[208] A. No, I don't think that I am. That would by indirection obtaining the information that you want directly.

Q. In other words, you refuse to answer whether you know or don't know whether they were filed?

A. That is right.

MR. WITKIN: I ask the Court to direct this witness that he must answer that question.

THE COURT: Motion denied.

MR. WITKIN: Your Honor will grant me an exception?

THE COURT: Yes.

MR. WITKIN: May I, for the record, introduce in evidence the subpoena, and ask that it be marked Exhibit H.

(Subpoena of the United States District Court calling for the production of Irving Greenberg's employer's quarterly tax returns for the three quarters for the calendar year of 1950, also his Federal Insurance Contributions Act tax returns, was marked Exhibit H.)

THE COURT: Do you have any questions, Mr. Goldschein?

MR. GOLDSCHEIN: No, sir; no questions.

THE COURT: All right. Next witness.

[209] IRVING GREENBERG, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. WITKIN:

Q. Mr. Greenberg, did you, during the year 1950, for any quarter, or at any time, file any Social Security return, or any return for withholding tax?

A. I did not.

MR. WITKIN: Cross-examine.

CROSS-EXAMINATION.

By MR. GOLDSCHEIN:

Q. Why didn't you?

MR. WITKIN: Objected to, may it please Your Honor.

THE COURT: Objection sustained.

MR. GOLDSCHEIN: Sir?

THE COURT: Objection sustained. That goes again to——

MR. GOLDSCHEIN: Oh, may it please the Court, this man has voluntarily taken the witness stand.

THE COURT: I know he has, but——

MR. GOLDSCHEIN: When a witness takes the witness stand, may it please the Court, and is asked a question—a [210] defendant in a case takes the witness stand—he takes the witness stand not alone to answer the self-serving statements of his counsel, but is subject to cross-examination on that issue. Now, suppose, may it please the Court, that this were just a straight out-and-out criminal case. A man is charged with, say, white slavery under the Mann Act, and he takes the witness stand and he is asked a question.

THE COURT: Yes, I guess that is pretty close.

He will have to answer that. I am going to limit you, though. I don't want his privilege here involved. He can't just take the stand—I don't want his privilege here involved on cross-examination any more than I do before the Grand Jury.

MR. GOLDSCHEIN: True. But when he takes the stand——

THE COURT: I know.

MR. WITKIN: He has a right, may it please Your Honor, and I am going to advise him, with Your Honor's permission, to refuse to answer that question because the very answer to that question will incriminate him, and he will answer—don't you see, all we have put him on for——

THE COURT: I know, but he has volunteered.

MR. WITKIN: But all we put him on for was to show he didn't file it. Why he didn't file it is a matter of [211] self-incrimination. I mean, Your Honor, we met that, if Your Honor will recall, at a prior hearing. I said we would be involved in that situation if we put him on the stand, and Your Honor was gracious enough to say that if that happened, I could withdraw him. Now, all we want to do is establish the factual fact of not having filed. The minute you ask him why—if he had to answer that—then he might just as well go back to the Grand Jury and answer all the three questions he didn't out of several hundred. But he has a right to refuse, if that answer would incriminate him.

In other words, the fact that he didn't file it doesn't incriminate him, per se. Your Honor is limited as to your findings, I take it, or you may be, as to his answer. But Mr. Goldschein can't elicit from him on cross-examination that which he is now being charged in contempt for. We are being charged for

contempt for not answering that question, and we are having our trial now. The only thing that this witness has testified to is that he didn't file it. Now, the minute Mr. Goldschein asks why, the witness has a right to refuse to answer on the ground of his Constitutional rights.

THE COURT: Are you claiming privilege on his behalf?

MR. WITKIN: Yes. He will.

By MR. WITKIN:

[212] Q. You were asked why. Now, answer the question.

A. I refuse to answer the question because I stand on my Constitutional rights.

Q. And on the ground it would tend to——

A. —on the ground it will incriminate me.

THE COURT: Well, we have the same question we had in the Grand Jury.

MR. GOLDSCHEIN: I move the witness be committed until he answers the question.

THE COURT: It raises the same issue, Mr. Goldschein.

MR. GOLDSCHEIN: May it please the Court, this witness took the stand voluntarily. He was placed on there by his counsel and asked a question which would elicit a self-serving answer. Now, to say that the Court can not——

MR. WITKIN: That is not a self-serving answer.

MR. GOLDSCHEIN: Wait a minute. If the Court please, I would like to finish when I start an argument.

MR. WITKIN: I apologize. You are right.

MR. GOLDSCHEIN: To say that any defendant in any case can get on the witness stand and be asked questions by his counsel, and then refuse to answer

questions on cross-examination that relate directly to those questions is stopping criminal prosecution altogether.

[213] As I suggested before—let's take a more serious question. Let's say we were trying a narcotics case, and a witness was asked a question, "Did you throw a package out of the window?" and he said "Yes." Suppose he was asked, on cross-examination, "What was in that package?" and he says, "I refuse to answer on the ground it might tend to incriminate me."

Now, can you just ask questions on direct examination and have the witness refuse to answer on cross-examination?

MR. WITKIN: Have you finished?

MR. GOLDSCHEIN: Yes.

MR. WITKIN: May I say in answer to Mr. Goldschein, he seems to miss the entire point here. It doesn't even make any difference why he didn't. The only thing we are establishing is that there is no record filed by him. Why he didn't isn't important, at this moment. It is simply that he didn't.

In other words, if Mr. Goldschein wants to question and cross-examine him on whether he did or not, that's proper cross-examination. But why he didn't isn't proper cross-examination. That simply is a left-handed way of getting back of what the Grand Jury said. He has a right to say to him, "Well, didn't you file one? Isn't it a fact that you had it [214] prepared, or didn't have it prepared?"—that's perfectly proper. But why a man didn't do something isn't proper cross-examination, regardless of the question of incrimination. The simple fact is, he didn't. Now, if Mr. Goldschein wants to cross-examine him as to whether he did or he didn't, that is one thing. But going and asking him why is certainly trying to get the witness

in a position before Your Honor where he is refusing to answer, and it is unfair and it doesn't mean anything. The point is he didn't. And all the cross-examination as to why, don't change that. The only right of cross-examination is on matters that pertain to his direct examination. And the direct examination is that he did not.

THE COURT: He has voluntarily put himself on. He is now claiming his Constitutional privilege, but since he voluntarily took the stand, the question is pertinent to the question asked on direct examination. I don't mind limiting him—and I intend to limit him—but he can't say he didn't file any, and not be asked why. I don't know of any ground——

MR. WITKIN: Will Your Honor then grant me an exception, and permit me, as Your Honor stated, to withdraw the witness?

THE COURT: No, he has got to answer.

MR. WITKIN: Your Honor, you told me that you would permit me to withdraw him.

[215] THE COURT: I know; I will permit you to withdraw him, I will permit you to withdraw him at any time, but you can't withdraw him in the trial of a criminal contempt——

MR. WITKIN: Your Honor told me you would.

THE COURT: I would, but he has to be asked the question——

MR. WITKIN: But Your Honor told me that if this situation arose—I mean I relied entirely on Your Honor, and I can read you the record—Your Honor told me, when I argued this same point before Your Honor, and I said to Your Honor—and I recall definitely, Your Honor, and I say this with all the solemnity a man can—I said, "Suppose we put him on the stand; then he gets in a position where Your Honor

can hold him for contempt for refusing to answer the question." Your Honor said, after lengthy argument, "That won't happen. I will permit you to withdraw the witness."

THE COURT: Oh, I didn't say he would not be in contempt; I said I would permit you to withdraw him at any time, and I wouldn't permit any discussion or examination which would go beyond whatever was at issue. But here, you have asked him a question. I can't let you withdraw him after you put him on the stand and ask him a question.

MR. WITKIN: Except that you told me you would.

[216] THE COURT: Oh, now——

MR. WITKIN: It's in the record.

THE COURT: I will see the record. I told you then I wouldn't let him be asked—go into a lot of questions, but when you open the door yourself——

MR. WITKIN: But we opened the door—I am going to be frank—I opened the door for two reasons. The main reason was, I was relying on that which Your Honor stated in open court.

THE COURT: Let's look at the record.

MR. WITKIN: Yes, let's find it.

MR. GOLDSCHEIN: May it please the Court, the Court said that you wouldn't permit any lengthy cross-examination.

MR. WITKIN: The Court didn't say that; the record will show what the Court said.

THE COURT: I said I would permit you to withdraw the witness, but I can't permit you to withdraw him in the middle of a question without an answer. That I didn't say.

MR. WITKIN: If Your Honor takes that position, I will withdraw him as though I never called him.

MR. GOLDSCHEIN: Oh, no.

MR. WITKIN: And ask that it be struck from the record. Now, Your Honor told me I could do that. Your Honor [217] said that you wouldn't put me in that position.

THE COURT: I don't know about that.

MR. WITKIN: Your Honor told me—I will read it to you—Mr. Kossman, will you find it?

MR. GOLDSCHEIN: He can't unscramble those eggs.

THE COURT: I said I would give you the permission to withdraw him at any time, and I will do that now. But you can't do it when there is a question asked him that is going to embarrass him, without an answer.

MR. WITKIN: Will Your Honor let me repeat—and my memory is clear, and I will read it to you in a minute—I said to Your Honor, when you were talking about putting him on the witness stand to admit that he had employees—I said to Your Honor, "This is what I will find myself in. I will put him on the witness stand, and he will say, he will answer a certain question. And then Mr. Goldschein, on cross-examination, will ask him, and then if he refuses, then Your Honor will say he is in contempt of Court before Your Honor, and I am worse off than I would have been before." And I said, "I would find myself in a devil of a position on that." Your Honor then said to me, "That won't happen. I will let you withdraw the witness."

THE COURT: Yes, but not in the middle of a question and answer, I didn't; I certainly never said to you [218] that you can wait and see whether it is embarrassing and then say you can take him off. Now, if

he would answer the question, and then Mr. Goldschein posed other questions which were——

MR. WITKIN: Your Honor, if he refuses to answer on the ground of self-incrimination, Your Honor is not going to hold him in contempt?

THE COURT: How can I say this will incriminate him?

MR. WITKIN: He says it will.

THE COURT: It raises the same question as before.

MR. WITKIN: Certainly. It raises the exact question. Is Your Honor going to take advantage of the fact——

THE COURT: I don't see here where this is nearly as close.

MR. KOSSMAN: We can always withdraw a witness.

MR. WITKIN: It is not as close, certainly, but if Your Honor makes him answer that question, or says if he doesn't answer it that he is in contempt, then I have been misled, and I am being very frank.

THE COURT: I want to see that record.

MR. WITKIN: Will Your Honor give us five minutes to get it? I will have to look through it.

[219] THE COURT: I never told you you could withdraw him in the middle of a question and answer; I certainly wouldn't do that.

MR. WITKIN: Will Your Honor give me a recess until we can find the record?

THE COURT: We will recess for——

MR. WITKIN: It shouldn't take me long; ten or fifteen minutes. I don't know where it is.

MR. KOSSMAN: May I say a word? Irrespective of whether Your Honor allows him to be withdrawn as a witness or not, irrespective of that, I am asking

for an offer of proof of Mr. Goldschein, as to the reason for his question.

THE COURT: Oh, it is cross-examination. He doesn't have to give you that.

MR. KOSSMAN: You have the right to ask that.

THE COURT: No, you don't.

MR. KOSSMAN: I will have an exception?

THE COURT: You may have the exception.

MR. WITKIN: I will find it in a moment, if Your Honor pleases.

(Short recess.)

[220] THE COURT: I am going to reserve decision. You can hand it in at any time. Is there anything else?

MR. WITKIN: No, that is all.

MR. KOSSMAN: Just a moment. We have other witnesses.

MR. WITKIN: We have other witnesses. All right, Mr. Greenberg.

MR. WITKIN: Now, may I respectfully, without appearing to be in any way either capricious or impertinent, call Mr. Goldschein as a witness.

MAX H. GOLDSCHEIN, called.

MR. WITKIN: I agree that Mr. Goldschein need not be sworn, if it is satisfactory to the Court.

THE COURT: Yes, indeed.

By MR. WITKIN:

Q. Mr. Goldschein, the presentment charges Irving Greenberg with failing to answer three or four questions. I am not exactly clear. May I ask you how many questions approximately were asked of Irving Greenberg by you before the Grand Jury?

MR. O'KEEFE: I object, Your Honor. He has no right to ask——

THE COURT: Objection sustained.

MR. WITKIN: Will Your Honor grant me an [221] exception?

THE COURT: Yes.

By MR. WITKIN:

Q. Mr. Goldschein, there were numerous witnesses who appeared before the Grand Jury. Is it true that you asked numerous witnesses matters pertaining to Irving Greenberg, the witness or defendant at bar?

MR. O'KEEFE: The same objection.

THE COURT: Objection sustained.

MR. WITKIN: Will Your Honor grant me an exception.

By MR. WITKIN:

Q. Mr. Goldschein, was Irving Greenberg to your knowledge——

MR. GOLDSCHEIN: May I get a record that I have on my desk?

THE COURT: Yes.

MR. WITKIN: I will hand it to you.

MR. GOLDSCHEIN: I will get it.

By MR. WITKIN:

Q. Mr. Goldschein——

A. Just a minute. On the previous question you asked me, on October 19, 1950——

Q. Pardon me. Do I understand the objection to that question is withdrawn and you are now answering it?

A. No.

[222] Q. There has been an objection to the question I just asked you.

A. That is right.

Q. The Court sustained the objection and I took exception. Now, I would like to know why you are talking.

A. I am talking because you have and were given by me a series of questions as ordered by the Court that Mr. Greenberg was asked before the Grand Jury and which he refused to answer. Those questions the Court ordered, the questions before the Grand Jury the Court ordered that you be given a copy of the questions he was asked and the answers he gave. On October 19, 1950——

MR. WITKIN: May I interrupt the witness?

THE WITNESS: You were given——

THE COURT: Let him talk. We will strike it out if it is irrelevant. There is no jury.

THE WITNESS: You were given two of these transcripts that were pinned together. If you want to see them, why, we have it here.

MR. WITKIN: May it please Your Honor, I ask that that answer be stricken from the record on the ground that it isn't responsive. I will ask that it be struck from the record for the reason that the two questions I asked were objected to, objection sustained, and I took exception. There is nothing before the Court, and Mr. Goldschein now [223] returns to the witness stand with a gratuitous explanation in response to no question at all.

THE COURT: Well, it may be helpful. I don't know. I haven't seen those questions. It may be helpful in the light of the answer.

MR. WITKIN: It only makes me pursue it, and I think it is an irrelevant pursuance. For example, I have to ask Mr. Goldschein questions about it, and I honestly think it is a waste of time of the Court.

THE WITNESS: I will withdraw it at this time.

THE COURT: You aren't going to waste time.

MR. WITKIN: I don't want to waste time.

THE COURT: I will admit it and take it subject to it and we will get on.

By MR. WITKIN:

Q. Then I will ask another question. Mr. Goldschein, what you have just read isn't the sum and substance or a total of all the questions that were asked of Mr. Greenberg before the Grand Jury, are they?

A. No, sir.

Q. In other words, there were many many other questions asked of this witness other than those contained in the records that you have just referred to?

MR. O'KEEFE: I object to that.

THE COURT: The answer to that is obviously yes. [224] Go on from there. I want an offer of proof with respect to this witness.

MR. WITKIN: I will make it.

THE COURT: Let us have an offer of proof.

MR. WITKIN: I purpose to ask and prove by this witness in addition—shall I start with the first two questions?

THE COURT: Do whatever you want, with the first or the sixteenth.

MR. WITKIN: I will start. I will make this offer of proof as though I hadn't yet asked of this witness any questions.

I purpose to prove by this witness that there were hundreds or perhaps over a thousand questions asked of Irving Greenberg before the Grand Jury, and that he has answered every one of those questions with the exception of the three or four questions which are presently before Your Honor.

I purpose further to show by this witness that other witnesses who appeared before the Grand Jury were asked concerning this witness, Irving Greenberg.

I also intend to show by this witness that Irving Greenberg himself is being investigated and was during the course of this Grand Jury by the United States Government.

I purpose to show that this witness knows that [225] Irving Greenberg was the subject of an investigation by the United States Government prior to the calling of this Grand Jury, and that the very questions for which he is now on trial for contempt, that the answers to those questions are not only known to the United States Government but are known to this witness who is at present on the stand.

I also purpose to show that to substantiate that knowledge there is in the possession of this witness as a Special Deputy Attorney General, or perhaps the word "Deputy" is wrong, of the United States of America, all of the information contained in his file which would definitely establish the unlawful business in which Irving Greenberg is in and concerning which there has been some testimony.

Your Honor, I just want to be informed, has Your Honor ruled on the motion that Mr. Goldschein had to produce the records?

THE COURT: No, that hasn't been finally ruled on.

MR. WITKIN: I purpose to ask this witness to produce the record for which he was subpoenaed and for which there was a subpoena duces tecum commanding him to appear and bring with him all records concerned with the investigation of Irving Greenberg as a witness before the Grand Jury, and in connection with the examination and questioning of other wit-

nesses who have appeared before the Grand Jury and who [226] have testified about Irving Greenberg.

If this witness shall have produced those records, then, of course, I would be governed by a further offer of proof as to what those records revealed and asking him further questions.

I purpose to show this witness the subpoena issued by the United States District Court in which he was subpoenaed.

I also purpose showing this witness and asking him to identify his oath of office dated September 13, 1950, which I ask to be made a part of the offer of proof in this case, showing that it involved certain possible criminal prosecutions, and particularly the one that we allege we are fearful of, to wit, the violation of the Federal Internal Revenue Laws, and I want to ask this witness to identify that.

THE COURT: Is there any objection to that?

MR. O'KEEFE: There is no objection, Your Honor. That is part of the Court's record already.

THE COURT: I thought it was.

MR. WITKIN: I also purpose showing by this witness—may I see that a minute? I think I can avoid that. I just want to see if it has the word "conspiracy" in it.

I also purpose asking this witness and proving by him that in open court he made the following statement: [227] "The Grand Jury asked of me whether it was proper for them to be present, if they could be present in court when the arguments took place, that they wanted to hear them. I told them that there was nothing improper about it, and I see no reason for their not being here if they wanted to be here to hear the arguments," and I want to find out from this witness whether that is a correct statement.

Then I also want to ask him whether he also said, "I was basing it on the fact that the Grand Jury may of their own notice subpoena people." It may have been "motion," but I have "notice."

MR. O'KEEFE: He can go to the record and get that.

THE COURT: The record will show it.

MR. WITKIN: I also purpose showing, and I think we can put several together, that various newspaper statements were made by this witness to the press, and I have the particular quotation and the particular dates, and I take it that Your Honor doesn't feel I ought to recite each one of those dates in their particularity.

THE COURT: I certainly do not.

MR. WITKIN: And I won't do it. I purpose showing that these statements made by this witness and by persons connected with this Grand Jury and by persons connected with the United States Government appeared in the [228] newspapers and therefore formed reasonable apprehension on the part of any person who would be reading them, and particularly Irving Greenberg, the defendant at bar, that there was a definite plan on the part of the Government not only to investigate him but to show that he as well as other witnesses were guilty of the Federal income tax laws.

I also purpose showing that in the newspapers in which the statements of Mr. Goldschein and others connected with him appeared, that it was stated publicly that the Federal income tax, that persons were going to be here because where they couldn't get people for violation of the State laws, such as gambling, numbers, and slot machines, that they intended by this Grand Jury to reach them through the violation of the Internal Revenue laws, and I am making that offer

of proof to this witness with the intent of following it up to show that the witness at bar had the right to have reasonable apprehension that they were so doing.

Then I intend to prove by this witness that he would admit that if any of Irving Greenberg's answers to the several questions which we have refused to answer would tend to incriminate Irving Greenberg that this witness would recommend to the United States Government the prosecution of Irving Greenberg for the violation of such Federal criminal statutes as his incriminatory answers would permit the United States Government to do, and I intend to prove by this witness [229] that immediately upon an answer being made by this witness that would cause him to admit or even make out a prima facie case of the violation of any Federal statute, particularly the ones we have referred to, that he would initiate or cause to be initiated prosecution under the Federal criminal statutes, of this witness. That is my offer of proof.

MR. O'KEEFE: If the Court please I think we can boil these points that he has down to about three. First, he wants Mr. Goldschein to reveal to him and in open court the transactions of the Grand Jury, which is not permissible, as Your Honor knows. He wants to show by his second point that the motion that Your Honor has under consideration now, namely that he produce his records, he wants to show by that whether or not he has a case or can present a case before the Grand Jury for violation of a Federal statute, what the evidence is that he has, and thirdly on that point he is making or will attempt to make Mr. Goldschein show all the evidence that the Government has, if they do have any, and we certainly don't admit one way or the other that they have sufficient evidence to put before the Grand Jury to make a case on this man.

Now, those three points are the only points he is making, and all three I am sure Your Honor with the exception of the second motion has ruled on already.

[230] THE COURT: What is your motion?

MR. O'KEEFE: My motion now, if this is a line of questioning that Mr. Goldschein is going to be subjected to, is that the Government makes an objection that he answer no questions at all in reference to this.

THE COURT: All right, the objection is sustained. The Court so holds as to each and every one of the offers seriatim. The motion with respect to quashing the subpoena duces tecum is still held under advisement until proper showing is made.

MR. KOSSMAN: Exception.

THE COURT: Yes, exception. Your motion I deny; I won't permit you to ask any other questions.

MR. WITKIN: If Your Honor please, grant me an exception as to the offer of proof made in its entirety, and also as to the offer of proof made as to its separate allegations contained there.

THE COURT: All right, any way you wish to have it.

MR. WITKIN: May it please Your Honor, I move that the Court direct Mr. Goldschein to supply counsel —and I am not sure whether this was ruled upon by Your Honor or not—with the minutes of the Grand Jury of all of Mr. Greenberg's testimony in order that we may ascertain whether or not in our opinion, and to offer such answers in evidence, that would indicate that Mr. Greenberg has [231] in effect answered the three or four questions. I keep saying three or four because I am not sure for which he is now on trial for contempt, and by the examination of those minutes, of his testimony, his entire testimony before the Grand

Jury it would give us the opportunity of offering those portions in evidence, if they exist.

MR. GOLDSCHEIN: May it please the Court, I don't know of anything that counsel has said to date which shows the capricious nature of the witness's claim of Constitutional privilege up until now.

THE COURT: Yes, we won't go into that. I deny that motion.

MR. WITKIN: Will Your Honor grant me an exception.

Of course I have a case, but if Your Honor doesn't want to hear the law——

THE COURT: I directed the Attorney General to give you what I deemed was substantive enough——

MR. WITKIN: In different form I make an offer of proof that all the matters that I referred to in the offer of proof as to questioning Mr. Goldschein about newspapers—I now want to offer the newspapers and the records in evidence, and sooner than have a witness take the stand with respect to them I make the offer of proof to put into the record the statements that I have referred to in the offer of [232] proof of Mr. Goldschein.

THE COURT: I don't know about the validity of it. What Mr. Goldschein has here said is a matter of record, I can't say that the newspapers quoted him correctly or not.

MR. WITKIN: These concern statements that were not——

THE COURT: They certainly didn't quote me correctly at least.

MR. WITKIN: These concern statements that were not made in open court by Mr. Goldschein.

THE COURT: How can I, unless Mr. Goldschein would be willing to have those statements made, credited to him in the papers as true and correct.

MR. GOLDSCHEIN: I don't know, once there was—I call the Court's attention to a statement they quoted me on that was attributable to the Kefauver committee.

THE COURT: That is what I say, it may be you were misquoted.

MR. GOLDSCHEIN: Just a mistake, that is all.

THE COURT: Mistake, yes. If they are newspaper statements, no.

MR. WITKIN: I won't argue something that Your Honor has passed upon but Your Honor has not permitted me to ask Mr. Goldschein whether he is correctly quoted in these newspapers, and therefore I am estopped from arguing that any [233] further.

Now, what I wanted to do is to produce the statements that were alleged to have been made by Mr. Goldschein in the newspapers from the newspapers themselves.

THE COURT: Here is what I think you want to do. You want to offer them—you want to offer them not for the truth of what was said therein but that it may have caused Mr. Greenberg in reading them to have gotten a false impression. That is what you really want. You are not offering them for the truth of what is stated.

MR. WITKIN: No. That is right, because in view of Your Honor's ruling on the offer of proof of Mr. Goldschein I can't, and Your Honor is a hundred per cent correct in saying that is the purpose at this time.

THE COURT: Any objection?

MR. GOLDSCHEIN: Yes. The witness has stated on the witness stand when he appeared there before that he was relying on the advice of his counsel.

MR. WITKIN: No.

MR. GOLDSCHEIN: —In not answering these questions.

MR. WITKIN: Mr. Goldschein—that is an improper statement.

MR. GOLDSCHEIN: It is of record here.

MR. WITKIN: No it isn't.

[234] MR. GOLDSCHEIN: I am talking about what the witness testified on the witness stand, may it please the Court. Mr. Witkin got on the witness stand and testified that he advised his client to answer the question would tend to incriminate him.

The witness got on the witness stand and read a long statement Mr. Witkin prepared for him saying that Mr. Witkin advised him that the answer would tend to incriminate him, and he is relying on Mr. Witkin's statement.

Where is that copy?

MR. WITKIN: That is what I am looking for and that will answer it. Here it is.

Let me read it.

"My fear and apprehension"—so as to correct you, Mr. Goldschein—"That I would tend to incriminate myself is based upon not only that which I have read in the newspapers but also upon the fact that—" so and so.

THE COURT: We will take them for what they are worth, for that limited purpose, but they are not offered to the truth that is spoken.

(Newspaper articles were received in evidence as Defendant's Exhibit I.)

MR. GOLDSCHEIN: May it please the Court, I would like to offer in evidence now those two copies of ques-

tions and answers that the Court ordered that I give [235] Mr. Witkin.

THE COURT: Isn't that a part of the record?

MR. GOLDSCHEIN: I don't know that they are a part of the record.

THE COURT: They ought to be in the record.

MR. GOLDSCHEIN: Yes, sir. I want to mark them, offer them as an exhibit, whatever the next exhibit number is.

MR. WITKIN: Pardon me.

MR. KOSSMAN: He has no right to offer exhibits while we are presenting our case.

THE COURT: Maybe it is a little bit out of order.

MR. GOLDSCHEIN: I am sorry. I will withdraw them for the present. I thought we were through with the case.

MR. WITKIN: May I hand those newspapers up a little later so that they will be in better order?

May I at this time ask that the statement made by Mortin Witkin in evidence in this case, which is part of the record, be construed to have been now repeated by me as a witness in these proceedings in order to save time?

THE COURT: That is with respect to your professional advice.

MR. WITKIN: That is right. And may I add [236] to that statement that the advice is agreed to by Jacob Kossman, associate counsel with me.

MR. KOSSMAN: One hundred per cent.

THE COURT: In other words you have corroboration.

MR. WITKIN: That is right.

MR. KOSSMAN: I have corroboration.

MR. WITKIN: Now I move, may it please Your Honor, for the acquittal of the defendant—pardon me, have you finished?

MR. GOLDSCHEIN: No, I have not.

MR. KOSSMAN: I make a motion for acquittal now at the conclusion of the defendant's defense.

MR. WITKIN: In order to keep the record straight there seems to be some controversy in the law as to whether or not——

MR. GOLDSCHEIN: Before you go on with your motion to dismiss——

MR. KOSSMAN: When shall I put in the newspapers?

THE COURT: Any time, we will permit you to do that.

MR. KOSSMAN: Thank you.

MR. WITKIN: Mr. Goldschein, I would like to make a motion before you make any rebuttal.

MR. GOLDSCHEIN: If you are going to make a [237] motion to dismiss I want to put this in the record before the motion to dismiss is made.

MR. WITKIN: May I make the motion to dismiss because I want to make sure——

THE COURT: No, he has the right to do that.

MR. WITKIN: Will Your Honor grant me an exception, if there is some dispute as to the law, I don't want to be caught——

THE COURT: That is our practice.

MR. GOLDSCHEIN: These——

MR. WITKIN: May I see them? I think I know what they are.

MR. GOLDSCHEIN: We will have this marked for identification if Your Honor please; they are questions asked Mr. Greenberg before the Grand Jury and answers he made that the Court ordered us to turn over to his counsel.

THE COURT: They will be received.

(A list of questions and answers pertaining to the defendant is received in evidence as Government's Exhibit A.)

MR. WITKIN: There is some question to the procedure as to whether you ask for an acquittal or whether you ask that the witness at bar be held not in contempt, or adjudged not in contempt, and in order that the record may be kept straight I ask for both.

[238] THE COURT: Have you anything else? Are you through now?

MR. KOSSMAN: The usual thing is just to say a word or two to Your Honor.

THE COURT: To what?

MR. KOSSMAN: To the Court.

MR. WITKIN: Pardon me.

THE COURT: Just a minute. Have you anything, Mr. Goldschein?

MR. GOLDSCHEIN: No, sir. Does Your Honor mean do I have anything to offer as proof? No, sir.

MR. WITKIN: Does Your Honor want to hear argument at this time?

THE COURT: What argument do you want to make that you have not made?

MR. WITKIN: I don't know what your procedure is, I don't know whether Your Honor wants to hear me. In other words what I would like to do is the

same as if I was addressing the jury, I won't be that long, just say to Your Honor what I saw from the record as it now stands that this defendant ought to be found not guilty and discharged, I mean that would be my argument to Your Honor at this time.

THE COURT: All right, I will give you ten minutes.

MR. WITKIN: That is plenty.

[239] May it please Your Honor, in this case the record does show that there were many many questions, that is in the presentment. The number of questions that we didn't answer are limited to "Are you in the number business" "Who" and about the telephone; the bookmaking we have answered "No."

I say this to Your Honor that I don't think it was humanly possible for counsel in this case to have stretched the rubber band on answering questions to the point of almost complete and absolute incrimination than we did in this case. I know that Your Honor knows it was done in good faith.

Now, his failure to answer the question about the number business or unlawful business, Your Honor has heard the argument, I am merely going to refer to it without rearguing it again, and that is because we of his counsel are of the firm and absolute opinion that the answer to that question, and to those three questions, would tend to incriminate him with regard to the various sections I referred to, and merely because I am not repeating the argument doesn't mean that that in any way lessens the forcefulness of that argument upon my mind.

Now, another thing. Here is a man, and I advance this argument to Your Honor in addition to that, who is in trouble, and he goes out into the field and seeks counsel, and [240] with perhaps modesty or lack of modesty he picks one who has been at the

bar for over thirty years, to wit, myself, and he lays his story down.

In that record Your Honor finds, and must find I take it that that witness acted upon the advice of his counsel, that he was advised by a man in whom he had confidence, whom he selected from the bar, who has had many years of experience, and that man under oath or similarly under oath comes before you and says "I said to Mr. Greenberg that if you answer those questions they would tend to incriminate you." And it was my honest belief.

Is that man in contempt? Is that man tenaciously and contemptuously, or whatever words they use, just saying to the Grand Jury "I am going to pay no attention to you." Is he flaunting the Court? Is he flaunting the District Attorney?

No. He answered every step we went. When there was this question propounded—the ones that Mr. Goldschein offered, when there were more questions propounded we continued to answer more and more every day, and out of fifteen we answered twelve.

Is this a man who has a reckless regard for the opinion of the Court, for the Grand Jury proceedings? No.

He hired two, lawyers, and then even at a late [241] date he gets the advice of a certified public accountant.

I think Your Honor has a right to assume, and I say this very frankly, that we counsel probably had the advice of Certified Public Accountants as to these questions.

Now, I realize this, that there is a Grand Jury investigation. I realize that there are newspaper articles, that there are other witnesses, but this case

isn't like the other cases, this case is different than almost any case that you have had before you.

This witness has gone so far as to admit being in an unlawful business, except that he didn't actually say "I am in an unlawful business." He has gone so far, may it please Your Honor, as to say being in an unlawful business, in a business, if we follow our common sense into the court room means that he has employees, because when he is asked about the telephone he said he didn't use it "For my lawful business" but he admitted using the telephone.

The only thing that he could have done, that he has not done, may it please Your Honor, is this, he has not actually put the words that would make him subject of prosecution on a criminal indictment, he skirted those words. In other words he has not said "I have employees and have not filed Social Security." If he said that then he is subject forthwith to a criminal prosecution and a criminal indictment.

[242] If he says "I am in the numbers business and have employees" he has done the same. But he has said what lawful business he was in. He has said what he uses for his unlawful business. And I don't know what more a witness could possibly do to show the respect, the dignity that he holds for this Court. And shall we say that every man who follows his lawyer unless the Court could find that the lawyer acted in bad faith, who relies upon that—I am not citing cases to you, I am not citing textbooks and I am not citing anything. I am appealing to Your Honor in this case, that this man right from the bottom of his heart, and his lawyers, from the bottom of theirs, have attempted to cooperate with you, they have attempted to answer everything they could conceivably do except say the words that would mark them for immediate prosecution.

And I could say to Your Honor I could be repetitious and go on—you gave me ten minutes, my ten minutes are not up but I could talk for an hour and I couldn't say more. There is no contempt in my heart for this court; there is no contempt in Kossman's heart for this court and this poor witness is relying upon us too, and he is taking our advice because we feel that those questions would tend to incriminate him.

Now, if Your Honor adjudges him not guilty I shall have concluded; if Your Honor adjudges him at a future [243] time guilty I would only want to ask for the opportunity of saying a few words before Your Honor would impose any penalty.

THE COURT: Mr. Goldschein.

MR. GOLDSCHEIN: No, nothing.

THE COURT: All right, we will recess until 10 o'clock Monday morning.

Do you want to submit any memorandum on these exhibits? You will have to go through them over the week-end, and I take it you have not seen them until now, Mr. Goldschein.

MR. GOLDSCHEIN: The what?

THE COURT: The many exhibits that have been offered here.

MR. GOLDSCHEIN: No, sir, I have not.

THE COURT: I think it only fair to the Government that if they want to say something on Monday morning at 10 o'clock after examining these many exhibits that they have the time to reply.

MR. WITKIN: No objection.

THE COURT: I don't want to preclude you from saying something with respect to them.

MR. GOLDSCHEIN: Ten o'clock Monday morning we have got to be in the Court of Appeals, I have an argument in the Court of Appeals; I have an argument in the Court of Appeals Monday. I assume they convene at 10 o'clock.

THE COURT: That is right. Well then we will [244] have to make it——

MR. WITKIN: Don't make it Tuesday.

MR. GOLDSCHEIN: Monday afternoon.

MR. WITKIN: Please, Mr. Goldschein.

THE COURT: I won't make any ruling immediately.

MR. GOLDSCHEIN: Two o'clock would be all right.

THE COURT: I am tied up in Civil Court and I may be in the middle of a trial. All right, we will make it two o'clock Monday, I will interrupt, this is more important. Two o'clock Monday.

MR. WITKIN: Is Your Honor going to hand down——

THE COURT: I don't know. I say I want to look at this—this is a formidable array.

MR. KOSSMAN: Would the Court care to have a brief on the subject? If you fix Wednesday I will have a brief in your hands by Monday afternoon.

MR. GOLDSCHEIN: We want to get through with it, if Your Honor please; this matter has been pending now for about four weeks.

THE COURT: No. Tuesday is sufficient.

MR. WITKIN: Monday you mean.

THE COURT: Monday I mean, at two o'clock.

(Court recessed at 11:50 A. M.)

[245] Philadelphia, Pa., November 8, 1950

Before Hon. J. Cullen Ganey, *J.*

Present: Max H. Goldschein, Esq., Special Assistant to the Attorney General, Justinus Gould, Esq., Special Assistant to the Attorney General, Vincent P. Russo, Esq., Special Assistant to the Attorney General, for the Government. Morton Witkin, Esq., and Jacob Kossman, Esq., for the defendant.

[246] The Court: In the matter of the Grand Jury witness Irving Greenberg, Irving Greenberg come to the bar of the Court.

(Irving Greenberg came to the bar of the Court.)

I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't, I am ready to impose sentence. Do you want to answer?

Mr. Witkin: We take the same position we have taken before, may it please Your Honor. Before you impose sentence, may I say a word?

The Court: Yes.

Mr. Witkin: May it please Your Honor, I am not going to reargue the case. Your Honor has rendered your decision, to which I take it Your Honor will grant me an exception. May I say to Your Honor that in passing sentence in this case, will Your Honor bear in mind first that when this witness was requested to be before the Grand Jury he voluntarily appeared. He was not subpoenaed until he made his appearance here. I had conferred with Mr. Goldschein and ar-

ranged for him to come in, and he came in very early in the proceeding. He was not one of those witnesses who stayed away for an undue length of time. He was out of town, and within two days or three days, I think, after his wife knew that he [247] was wanted, I communicated with Mr. Goldschein. I think Mr. Goldschein will bear me out.

In the second place, may I ask Your Honor to bear in mind, in sentencing this defendant, that the number of questions that he hasn't answered were few in number, very few in number, and I merely repeat by reference, without repeating again the argument I made before Your Honor, as to the fact that I thought he had gone practically the entire length in answering every question except the one that would actually make him incriminate himself; and along that line may I just read—and this is solely for the purpose of influencing Your Honor on the question of sentence at this time—that which was said by Justice Frankfurter to the Attorney General or the Solicitor General yesterday in an argument at Washington on the Rogers case, and I think it has a great bearing on this case.

Justice Black it was, speaking to Mr. Perlman, page 34, "I assume you would admit, wouldn't you, that the Government can't compel people to give the names of witnesses who could give evidence against them in a crime.

"MR. PERLMAN: I do admit that."

That was in the argument, and I refer to that with regard to the mitigation of the sentence against Irving Greenberg at this time, because in one of the three questions that we failed to answer, the question "Who," my argument was [248] he would be giving names of witnesses against himself, so what I am trying to point out is that this man really does not in his heart——

THE COURT: You are assuming that there was a crime, and Perlman answered there, "I do admit that."

Read the question again.

MR. WITKIN: "I assume you would admit, wouldn't you, that the Government can't compel people to give the names of witnesses who could give evidence against them in a crime."

The answer of Mr. Perlman was, "I do admit that."

THE COURT: I agree with that.

MR. WITKIN: It is our position that that is this case.

Then also may I point out that there seems to be a great deal of confusion both as far as witnesses at bar, as well as persons involved, and also the United States Government itself, and I read you from the argument that took place in the Supreme Court yesterday and the statement made by the Solicitor General there, showing that the law is pretty indefinite and pretty non-clear, to use that expression, with regard to these contempt proceedings.

For example, Justice Frankfurter said, "Your [249] time has expired.

"MR. PERLMAN: May I say we have this problem, because I stated when I started out there are so many of these contempt citations that have been voted by Congress that we have to decide what we are going to do with them. We don't want to have a lot of foolish prosecutions all over the country.

"THE CHIEF JUSTICE: You haven't quite decided yet.

"MR. PERLMAN: We are waiting for the Court and then we will take action.

"THE CHIEF JUSTICE: You haven't quite decided.

"MR. PERLMAN: Well, we are waiting for the Court."

Then the argument continues. I point all of these things out to Your Honor to show this, that this isn't a case where a witness is flaunting the Court, and in passing sentence upon him, it is different than any case, I think, that has been before Your Honor, because he has answered almost every single question that has been put to him except three questions, and in the opinion of his counsel, and after careful and serious consideration, he refuses to answer because he is fearful that that will absolutely incriminate him; and therefore I say to Your Honor that the sentence that you should pass or make—[250] I respectfully suggest—upon him should be proportionate to the fact as to what is in this man's mind. In other words, is he just trying to impede or obstruct the Grand Jury and simply saying I won't do this or I won't do that? That is not the case here. He is not really a recalcitrant witness; he is a witness who has gone as far as he thought he could go without actually putting words in his mouth that would incriminate him, and that is due to the fact that it was our opinion—whether we are right or wrong—that if he answered the questions any further than he did, that he would; and I say to Your Honor that he did appear voluntarily. He came here, and I think he has answered, and, of course, Your Honor disagrees with us, and this is no time to argue the case, after Your Honor passed judgment, but I do think that in so far as the sentence is concerned, that Your Honor ought to take that into serious consideration.

THE COURT: Mr. Goldschein.

MR. GOLDSCHEIN: May it please the Court, this isn't a question of who Mr. Greenberg may be. The

Court is not particularly concerned with that at this time. The Court, I imagine, is concerned with the processes of the Court and the Court itself maintaining its functions, that the Grand Jury, a part of this Court, may continue to operate. Witnesses must understand that when subpoenaed before the Grand Jury, they [251] must answer questions, and when the constitutionality of a question is challenged by them, it belongs to the Court to determine that issue, and not the witness. If the witness takes it upon himself to thwart the process of the Court by defying the order of the Court to answer the question, then he knows exactly what he is doing. He has two counsel here. He knows that in refusing to answer the Court, he is defying the Court, he is obstructing the processes of the Court, and if this witness can be permitted to do that, then all other witnesses will do that. If the penalty for refusing to answer is a light one, then, of course, they can all afford to take the light sentence rather than answer questions before the Grand Jury.

Your Honor has seen from the last witness that the Court had here on the question of contempt that a sentence of five months was not sufficiently severe to deter that witness or subsequent witnesses. This witness is probably assuming that Hoffman got five months and that he won't get any more than five months, and he can do five months just as easy as Mr. Hoffman.

Now, we are hoping that the Court will give the witnesses to understand that each successive witness that comes before him on questions of contempt will be dealt with more severely than the witness before, so that those who come before the Grand Jury will have in mind that it isn't just a light sentence that they can do by standing on one foot. It is the [252] only way that the Grand Jury will be able to continue to

function. We have hundreds of witnesses to be subpoenaed before this Grand Jury and questioned, and unless a severe penalty is imposed, the functions of the Grand Jury will be hamstrung.

MR. WITKIN: May it please Your Honor, in reply to Mr. Goldschein, I think his statement is rather unfair and unjust. This man hasn't hamstrung the Grand Jury; he answered almost every question that was put to him pertaining to almost everything that was asked of him. The only questions he didn't answer are those that he honestly and sincerely believes involve him in the commission of a criminal offense. Every other question he answered. This isn't a case of a man hamstringing the Grand Jury or obstructing justice. He went all the way down the line. The few questions where he thought and honestly thought—and I think Your Honor has said in this proceeding that you honestly believe that counsel were sincere, and I think Your Honor does honestly believe that counsel is sincere—but he went all the way down the line. Out of fifteen questions, he answered twelve of the fifteen.

There were only three. One was his business, and Your Honor knows that we have a legal argument, because Your Honor referred to the fact that the matter ought to be decided by the Circuit Court, in Your Honor's deliberations in this [253] case, so that Your Honor felt that the matter was a matter that was subject to final determination by the Court. Now, if Your Honor felt that way, certainly this witness and his counsel have a right to feel that way, and we feel that way. We feel that Your Honor is in error. Perhaps Your Honor is, perhaps Your Honor isn't, but what I am getting at here is that there is no attempt of obstructing or hamstringing the Grand Jury in this case, because it isn't that type of case. Here is a man

that went the whole hog, except he was asked who, and fearful of giving names of witnesses who would incriminate him, he refused to answer. When asked about his business, he admitted, not for his lawful business. He was in an unlawful business, so we have gone to the edge of the precipice, and the only thing, in our opinion, that we haven't done is dropped off, and no matter what Mr. Goldschein says, his case is different from any other case, because we have gone absolutely as far as we can go, and I respectfully submit that this man is entitled to a much lesser sentence than that handed down to any other previous witness.

THE COURT: No, I don't see much difference between this and the Hoffman case. It goes down to a question of whether a man can decline to answer when he is asked, "What is your business?" whether in the numbers business, the answer to which is violative of a state statute but does not [254] give any right to predicate a claim for self-incrimination here.

The sentence of the Court is that you, Irving Greenberg, undergo imprisonment, for violation of criminal contempt proceeding 15893, of five months.

MR. WITKIN: Will Your Honor fix bail?

THE COURT: Bail is set in the sum of $10,000.

MR. WITKIN: Thank you.

OCTOBER 9, 1950.

[132] . . . nature of it.

Now, in Claiborne v. United States, 77 F. 2d 690, the Court stated there:

"It requires no citation of authority to demonstrate——"

MR. GOLDSCHEIN: What case is that?

MR. KOSSMAN: Claiborne v. United States, 77 F. 2d 690.

"It requires no citation of authority to demonstrate that the Federal Grand Jury was without power to investigate violations of the laws of Missouri."

There were certain questions there, I think, which involved slot machines. I am not certain about that, and the man refused to answer, but the Court said this involved the violation, his refusal to answer was not based because he was afraid of getting in trouble with the federal authorities, it was based because he made that statement in the state court and they went on and gave this wonderful bit of law which Your Honor and counsel and everyone else knows. The federal Grand Jury was without power to investigate violations of the laws of Missouri and for this purpose I say the laws of Pennsylvania.

Now, another thing, in this Kilpatrick case, 16 Federal Reporter, page 765, the court also stated:

"A prosecuting officer has no right to send [133] witnesses to the Grand Jury room merely to be interrogated whether there has been any violation of law within their knowledge."

Now, coming to a Supreme Court case, and I know Your Honor loves Supreme Court cases, in United States v. Ryan, 52 Supreme Court, 141, there was the case involving the refusal to give information. The man refused to testify. As a matter of fact, the contempt proceeding was upheld there but the court stated:

That the plea does not rest upon any claims that the inquiries were being made to discover crime against state law. The investigation was under federal law in respect to federal matters.

In other words, the court stated that was an investigation involving federal matters and therefore the man should have answered the question but it made that finding.

THE COURT: This is an investigation under federal law.

MR. KOSSMAN: Wait, if the Court pleases, I will come to this numbers business or bookmaking business themselves. I am talking now about the relevancy.

THE COURT: But these questions have nothing to do with that.

MR. KOSSMAN: These questions have nothing to do [134] with federal law and in anticipating my argument it would involve them and would be self-incriminatory. It is simple. Mr. Goldschein knows that. Mr. Goldschein is one of the most brilliant attorneys in the country. Mr. Goldschein comes here and wastes time asking inconsequential questions? He has got plenty of work to do in New York and Chicago.

Now, further strengthening my argument, on September 19, 1950, Attorney General Howard McGrath spoke before the Criminal Law Section of the American Bar Association and stated: "So long as I am the Attorney General it will not be the purpose of the Department of Justice to usurp the functions of state and local powers or to conduct an investigation that extends beyond the Constitutional——"

THE COURT: Take your time.

MR. KOSSMAN: Now, that is the first part of my argument. Therefore, unless the Court will find, and you must give it careful consideration, it is not fair to shoot these questions, Your Honor, day in and day out without having any time to make some research. It has never been done before in more important cases. Therefore, unless the questions pertain to violations

of national laws they are utterly irrelevant and beyond the federal Grand Jury to ask. There is not the slightest question about it. There can be all the local gambling in the world. That is of no concern of a [135] federal Grand Jury. That is, the first part——

THE COURT: You mean to say this federal Grand Jury has no license to make inquiry into gambling and bookmaking and any other things just because they are a federal Grand Jury? You can't question that. The cases have so held repeatedly. It is only at the end of the inquiry when they find out whether a federal offense has been committed that would forestall and preclude ever finding a federal offense—not ever finding, but it would preclude and forestall an inquiry which might develop into, shall we say, to the use of the mail.

• • •

[166] MR. KOSSMAN: But look, the question is this, Your Honor: Does the man have a reasonable apprehension in his mind that he may incriminate himself? That is the issue. In order to show the reasonable apprehension he has in his mind——

THE COURT: Why don't we approach it this way? I think we are getting the cart before the horse. Let us find out. All those cases, I take it—I know the Cussons case, and I have read a lot of these cases; I cannot call them by name. There are certain extenuating circumstances. Once the door is ajar, why that is another matter. Now until it is in the record, the Court has nothing—I have no criterion to go by. What is the use of your telling me the general principles?

MR. KOSSMAN: You see, I had to give you that as background.

THE COURT: You could make the assumption——

MR. KOSSMAN: Because I wanted to show you the questions without that particular background, showing that questions that might even tend to the commission of crime——

THE COURT: I think Mr. Goldschein will agree with you on the broad general law. The application is simply——

MR. KOSSMAN: The questions are so strong, if Your Honor please. Take the Alexander case—two Alexander cases—very interesting cases. Mr. Goldschein handled both . . .

• • •

[173] . . . very soon.

THE COURT: Ten minutes, Mr. Kossman.

MR. KOSSMAN: Well, I feel, aside from the nature of this case, it applies to all the other cases as well.

Now, Judge Ganey in his charge stated:

It probably will be some time before a bill of indictment is presented to you, because the Attorney General, I assume, is going to call a great number of witnesses. That was in the newspaper.

I also want to remind Your Honor that you also stated that a democratic process is the envy of the world, and that liberty is not something to be tucked away in historic spots or shrines; it is something which each generation must renew and must keep with fidelity.

It seems to me in the type of case where we are trying to substitute refined torture for the rack and the thumbscrew, this Court should be alert on the side of the defendants from whom Mr. Goldschein is seeking to extract testimony in order to convict them, and I submit that this whole Grand Jury may just eventually be a tremondous burden on the taxpayer, because by

virtue of calling these witnesses and even extracting testimony he may place himself in the position where he can never proceed with indictment on these . . .

• • •

[175] . . . bad, if not worse, in Philadelphia and in adjacent counties, as in any place in the country. We understand that there are some bad actors in town. If this proves true, Philadelphia and nine counties are in for a real cleanup. It will extend to rackets and other ramifications, the Justice Department indicated. Even though there are no federal laws regarding the numbers, slot machines and other rackets, the probers will strike at such through the revenue and conspiracy laws. I think——

MR. GOLDSCHEIN: Just a minute. Just a minute. Is that attributable to me? Is there any statement there that comes from me?

MR. KOSSMAN: No, I said it comes from the newspaper.

MR. GOLDSCHEIN: Oh, I see.

MR. KOSSMAN: I don't know whether it is attributable to you. When you are on the stand, we will find out. It says here, Goldschein himself stressed the importance—I am quoting from the newspaper. I have the actual newspapers, but I don't want to take the time, but if that is true, Your Honor——

THE COURT: That is puffing.

MR. KOSSMAN: I beg your pardon?

THE COURT: That is just a little puffing.

[176] MR. KOSSMAN: Well, if I had known I was going to argue this case I might have trained for it.

THE COURT: I didn't mean you; I meant the article.

MR. KOSSMAN: I beg pardon?

THE COURT: I didn't mean you puffing; I meant the article.

MR. KOSSMAN: Oh, well, maybe we are both puffing, but the effect of that puff might be to puff out the whole case, because telling people that the probers will strike at such things through the federal revenue and conspiracy laws—he said—he said—now I think it might be attributable to Goldschein directly—Your Honor, did you want me to look it up now? September 14?

THE COURT: Not right now.

MR. KOSSMAN: All right, because I notice I have quotes there.

Now it seems to me that both Attorney General McGrath and Perlman are in complete accord that our liberties must be protected, that there must not be an investigation of local things. Perlman, speaking in Philadelphia—Solicitor General Perlman—stated, in setting up defenses against infiltration the nation must be extremely careful not to play into the hands of its enemies by impairing the basic liberties [177] of its own people. Now there are many other problems and cases that I would like to discuss with Your Honor. I particularly wanted to call Your Honor's attention to the fact, because I had read in the newspaper and I read in the notes that there was a question as to whether the offense might be bailable, so you see I am very worried about the case, and I would like to point out the fact.

MR. GOLDSCHEIN: We will get at that when we get through with the present proceeding. I don't think we ought to argue bail now.

THE COURT: No.

MR. KOSSMAN: No, just a moment. In the Camarata case bail was allowed.

THE COURT: Yes.

MR. KOSSMAN: But it said there in the notes of testimony you didn't know whether—so it says there Camarata was released by Judge—I think it was Judge Fake.

Oh, yes, as long as I am talking about the Camarata case, which Your Honor has quoted several times, in that case the District Attorney was particularly careful in stating to the Court—now in answer to—here is the District Attorney: "Now he is determined in his mind that this investigation is directed against him." This is not a question in his mind. We have got newspapers, which doesn't appear in [178] any other place except in his mind. He has determined that it may subject him to the lottery statute. Well, that is impossible in his instance.

The court says, "Why?"

Mr. Smith was District Attorney there, or his assistant. "Because his operations were entirely within the confines of Atlantic City.

"THE COURT: Might he not be made a conspirator to violate a federal law?

"MR. SMITH: (Government man) If the Court please, if we say to him, was this service furnished from Philadelphia, or any other question which would turn it into an interstate character, then he might come back to this court."

Now if the Court please, I sometimes forget myself when I argue before the Court, but I am always mindful and appreciative of the courtesy, attention and thoughtfulness that is given to me in any case that is argued.

I want to leave the Court with one thought to distinguish this from the other cases. I can't help it if

the other cases went up on poor records and the Circuit Court only had just questions. I can not help it if things were not brought out in other cases that perhaps if the District Court had had those facts before it, there would have been a different [179] decision.

I would like to bring out the fact that Mr. Goldschein when he came here filed an oath in which he stated that there is occurring in the Eastern District of Pennsylvania—I have a certified copy of his oath—numerous cases of fraud upon and conspiracies to defraud the Government of the United States, involving violations of the customs, narcotics, internal revenue, and the liquor laws, as well as violations of the White Slavery Act, perjury, bribery, and other criminal laws. Do you mean to say that he is just asking questions to find out if a man violated the state law?

If the Court please, if you will allow me a day or two I will have it all typed up, and in at least grammatical order, if not legal, logical order.

MR. WITKIN: Will Your Honor indulge me one second before I make a statement to the Court.

May I ask Your Honor to give me less than five minutes—just three minutes. I am not going to argue, or cite any law. I merely want to say to Your Honor that from the facts of this case this man did answer what business he was in. He stated fully and completely, but when he was asked whether he had any other business, this is the testimony.

"Do you have any other business?

"I refuse to answer."

[180] And, of course, he refused to answer, and, of course, he meant on the grounds it would tend to incriminate him.

"Mr. Goldschein: I am talking about lawful business now. Do you have any other lawful business?"

The answer is, "No, sir."

Now, definitely, that question, forgetting all law, because I think we agree on the law, Mr. Goldschein wants him to admit that he had an unlawful business. May it please the Court, when he says, "Are you in the number business now? Are you in the bookmaking business now? Do you operate a bookmaking establishment?" I think it is as plain—if I may be facetious and yet serious—as the nose on my own face, that the answers to these questions definitely form a link to incriminate him. He didn't refuse to answer Mr. Goldschein that he was president of a corporation or something of that kind; he only refused to answer with regard to any unlawful enterprise on his part, and it is quite obvious that the minute he answered that he would be incriminating himself, if on nothing else, on the internal revenue laws, if that were a fact, which is set forth on the agenda of the Grand Jury at the time that Mr. Goldschein took his oath.

So I respectfully submit, Your Honor, that this [181] case is a little different than the others that you have heard before, because in this case he has definitely answered questions as to his occupation. It is only when he came to violations of the law, that he tried to get the witness to say, "I am a violator of the law," and I respectfully submit there are some innocuous questions here, and without detracting from Mr. Kossman's argument—for example, I have no objection, even though I think it is immaterial, to say, "I own a certain kind of automobile," or "a certain place is a cleaning and dyeing place," but the meat of this case is whether or not Mr. Greenberg can be forced to admit that he was engaged in an unlawful business, with the attendant fact that it forms a link which undoubtedly—

to me it is just plain common sense—would tend to incriminate him, and on that I think he is on solid ground.

THE COURT: Suppose he was in the bookmaking business; why would he have any right against self-incrimination in answering that?

MR. WITKIN: I will answer that.

THE COURT: How?

MR. WITKIN: Let us say, for the sake of argument, in his income tax return he did not say he was a bookmaker, or a betting commissioner, and if he did not, may it please Your Honor, I think you will agree with me, that [182] whether or not the amount of money he returned was correct or not, any false statement in an income tax return is punishable as a crime, and it would incriminate him.

Now if in his income tax he did not say he was a bookmaker or a betting commissioner, or a gambler, the minute he answers to the Grand Jury that he was in the bookmaking business, he has ipso facto stated, "I have filed a false income tax return," even if he filed for every dollar that he ever made in any illegitimate enterprise, and I don't think that argument can be answered.

THE COURT: Well, suppose I was in the automobile business or the restaurant business, and was asked, "Are you in the restaurant business?" And they said, "Are you in any other business?"

Suppose I did not file a return on my automobile business; could I claim the right against self-incrimination?

MR. WITKIN: Oh, I think you could.

THE COURT: I think they would have to go further than that.

MR. WITKIN: Oh, no; may it please Your Honor, in your income tax return you are definitely compelled to swear as to the nature of your business.

THE COURT: I know that.

MR. WITKIN: You have no right to conceal; you [183] have no right to add or detract. You can not put a false business in there. You can not say you are in the restaurant business when you are in the automobile business, even if you filed a greater return. But certainly if I have to admit that I am engaged in an unlawful business, even under Your Honor's question I think I am right, but even if I have to admit I am in an unlawful business, it seems to me quite evident.

THE COURT: The mere fact that it is unlawful has no bearing on the Internal Revenue Code.

MR. WITKIN: No, but if I know—if I know—that I didn't put that into my income tax, and if I know that even though I may have paid the Government what I owed them, if I know that I didn't put it in, then I am incriminating myself, because I am admitting that I filed a false return and I am subject to prosecution just the same as if I had cheated or defrauded the Government of money. This question certainly does that.

This is the only question really involved in this case—in so far as the facts are concerned—forgetting the legal technicalities—is whether I have to admit that I am in unlawful business and whether that does not form a link to make me incriminate myself.

I say to you very frankly that in my opinion, [184] as an officer of the court, that if I had to advise, and I had been told I should not say this, but I think Your Honor knows me well enough to know that I say what I honestly believe is right, if I had to advise Mr. Greenberg in view of what I knew, my honest opinion as an officer of the court is that if he admitted being engaged

in an unlawful business he would be incriminating himself, and if I had to take the witness stand under oath I would say that is my honest, bounden opinion. I might be wrong, but at the same time here is a man who is not failing to testify—and I know I am being repetitious—as to his lawful business, but he answers the question that he refuses to state about his unlawful business. He does not state he is in one, but that is his answer, and I say it follows, just the same as night follows day, that if he does answer that he is putting himself right into the noose, if he, who has sole knowledge of what he has done, knows that that makes him guilty of making a false statement somewhere where it is a violation of a federal law.

And while I am frank to admit that gambling or numbers is a violation of the state law, it is only a small link, but in my judgment, may it please Your Honor, a very important link.

You have been very courteous to Mr. Kossman and me. I thank you.

[185] MR. GOLDSCHEIN: May it please Your Honor, I am certain that it requires no argument—extended argument—to say to Your Honor that a man who declares in his income tax return that he paid $2,000 for gambling cannot certainly be prosecuted, if that gambling money was earned in the numbers racket, bookmaking racket, betting on baseball, or shooting dice. If he declared the money he earned, the federal Government can not prosecute for a false income tax return.

The argument that the Rogers case is in point in this particular matter certainly can not possibly hold water. The Rodgers case is based on an investigation by the Grand Jury in Los Angeles, may it please the Court, and the questions there were what the particular witness knew about the Los Angeles County Communist

Party; that is, who its officials were—I am talking of the Alexander case; I get them mixed.

THE COURT: That is what I thought.

MR. GOLDSCHEIN: Who the officials were, the table of organization, for the purpose of determining who had the books, so that we could subpoena into the Court the books and records, and from those books and records determine whether or not any Government employees were members of the Los Angeles County Communist Party.

As the record will show—not the Alexander [186] case, but the cases that followed—we finally did get Dorothy Healy, who was secretary of the Los Angeles County Communist Party, and did have her before the Grand Jury in an attempt to get from her the books and records, but in each one of the cases that came up, and there were twenty-seven of them in Los Angeles, beginning with Alexander, Kasinowitz, and all the rest of them. In each case the defense was that there is an indictment in New York charging twelve Communists with violation of the Smith Act—that is, teaching and advocating the overthrow of the Government by force and violence—and that the Communist Party was advocating the overthrow of the Government by force and violence, and if these people answered any questions pertaining to the Communist Party, the Court might infer, and the Grand Jury might infer, that they had some connection with the Communist Party, and hence they might be guilty under the Smith Act. That is the reasoning of the majority in the Alexander case, because Judge Denman on the argument on bail said this: I don't think this or any other court in the United States would go along with Judge Denman on that, and this is the basis for his decision—

"Mr. Goldschein, we all know that there is an international conspiracy emanating from Moscow to

take over this Government, of course," and then turns around [187] and says, "But we have got to protect the Constitutional rights of these individuals."

The only answer I could make to that was "Judge, I will go along with you on the first part, but I can not understand why you single out these individuals. Who are they, and what connection do they have with the Communist Party?"

Of course, the original decision in that case was three to three, and Judge Denman wanted the case reconsidered because Judge Pope was then commissioned and appointed on the Ninth Circuit, and Judge Pope went along with Judge Denman on his decision of the case, but dissented and went with the minority on the question of the introduction of these newspapers.

Now, let me point out to the Court how ridiculous that decision is; because six months after the case was tried in the District Court, and went to the Appellate Court, the Attorney General wrote an article—I believe that it appeared in "Look" magazine, on the Communist situation in the United States, and after that article was published—and the Attorney General was on the Supreme Court when it was published—Judge Denman used that article in his decision to show what the Attorney General had in mind eight months before that. The Attorney General was talking about the New . . .

• • •

[191] THE COURT: That is the card case.

MR. GOLDSCHEIN: The Willie case.

THE COURT: That is the card case, isn't it?

MR. GOLDSCHEIN: Yes, sir; the Mason case is where they are sitting around the table, and the last case in this District is the Camarata case which is based on the Mason case and cites these other cases.

THE COURT: What about this 179 Federal 2d? Are you familiar with that?

MR. GOLDSCHEIN: That is the Rogers case?

THE COURT: Yes; I don't remember that at all. I am not familiar with that.

MR. GOLDSCHEIN: That is the Communist case.

THE COURT: That is the case you have just talked about?

MR. GOLDSCHEIN: Yes.

MR. KOSSMAN: Certiorari granted there.

MR. GOLDSCHEIN: That is right. That is the case where they introduced copies of the indictment in the case in New York.

THE COURT: Yes, I remember it now, but you did not refer to it by citation.

MR. GOLDSCHEIN: Yes; that is the Rogers case. Now, may it please the Court, if these witnesses—and I don't [192] know whether Mr. Kossman identified Mr. Greenberg as one of the racketeers that was referred to in the newspaper—he did not say that, and I assume he doesn't mean that.

The very fact that the Grand Jury is making an investigation to determine whether or not racketeers are violating the federal law does not give his client the right to refuse to answer any question except those questions which show a direct tendency to incriminate him of some violation of a federal statute. Now when he makes that showing, I do not think there would be much difference between Mr. Kossman and me, or between the Court and me on any question. If there is a showing that the answer would tend to incriminate, why that ends it. But these questions on their face——

THE COURT: What about Mr. Witkin's contention, and Mr. Kossman's, that here he was asked whether he was in an unlawful business?

MR. GOLDSCHEIN: Yes——

THE COURT: Yes; that is a step further.

MR. GOLDSCHEIN: Is he in the numbers business? Now——

THE COURT: The argument is that if he said that it may well be that he was violating the—the tendency would be that he was violating the internal revenue law.

MR. GOLDSCHEIN: Which one? There are three [193] volumes of them, I think. They are that thick. I know he could not violate it all if he tried. Then what is he talking about? Are we to speculate here? Does he know what law he might have violated, or what law it would tend to show? Can Your Honor imagine which one of those laws he is referring to? He certainly could not mean the income tax law.

MR. WITKIN: Sure I do.

THE COURT: Yes; that is what I understood.

MR. WITKIN: Section 145 (c).

MR. GOLDSCHEIN: May it please the Court, suppose he did not pay any tax——

THE COURT: Take it easy. We aren't getting any younger.

MR. GOLDSCHEIN: My blood pressure—it is low, may it please Your Honor.

THE COURT: You are lucky.

MR. GOLDSCHEIN: Suppose he says, "I am in the numbers business now"—now, since the first of the year—and we have limited it to this year, the year 1950; there is no tax to anybody for the year 1950, as

the main question is limited to 1950; it says "This year." Now what law could it possibly lead to the violation of? What law? No taxes are due.

If I asked whether he paid his income tax for [194] the year 1949, then he might say, "I refuse to answer on the ground it would tend to incriminate me," and say to Your Honor, if I answer that question——

THE COURT: Is this question limited?

MR. GOLDSCHEIN: Yes, sir; it is.

THE COURT: I mean, they are definitely limited to now?

MR. GOLDSCHEIN: Are you in the numbers business now? I refuse to answer.

THE COURT: Now?

MR. GOLDSCHEIN: Yes.

Are you in the bookmaking business?

I refuse to answer.

Did you during the past year, this year, operate a bookmaking establishment?

I refuse to answer.

MR. WITKIN: It does not say this year, Mr. Goldschein; it says "past year". I hate to interrupt you.

MR. GOLDSCHEIN: "Past year." That is what it says—it refers to the year 1950.

MR. WITKIN: Oh, no.

MR. GOLDSCHEIN: Well, we will paraphrase it when he goes back before the Grand Jury and limit it to 1950. That is what the intent of the question is.

• • •

[202] . . . situation that——

THE COURT: That merits it.

MR. GOLDSCHEIN: —is pertinent.

THE COURT: Yes.

MR. GOLDSCHEIN: But certainly not on the questions here.

THE COURT: Well, he says that the questions are irrelevant. He deems it has merit, I take it, or he would not argue so vociferously and as persuasively as he has.

MR. GOLDSCHEIN: Well, what questions? None of these questions?

THE COURT: Some of them, according to him, are irrelevant. I have forgotten the particular ones.

MR. GOLDSCHEIN: All right; they are not relevant to what?

THE COURT: To the determination of whether a federal crime has been committed in this jurisdiction.

MR. GOLDSCHEIN: Well, now, we must presuppose——

THE COURT: Isn't that your position?

MR. KOSSMAN: That is correct.

MR. GOLDSCHEIN: We must presuppose, then, that Mr. Kossman knows what particular statutes the Grand Jury is investigating, or says that none of the questions that are asked could possibly touch or have any bearing on any federal [203] law.

Now Your Honor would not say, I know, what particular statutes the Grand Jury is investigating, and Your Honor instructed the Grand Jury. Here is Mr. Kossman, who is not an official of the Court; he knows only what his witness told him, and he presumes to tell Your Honor that particular questions have no relevancy—to what? There must be some particular issue when you speak of relevancy. It is relevant to what? The statute?

THE COURT: That is the point I want to make. I ask both of you, what is the criterion which this Court can use here and now in the determination of relevancy? What is my criterion?

MR. GOLDSCHEIN: Just this—just this.

THE COURT: Let me finish.

MR. GOLDSCHEIN: I am sorry.

THE COURT: Here is a question asked the witness about the commission of an offense, at best under the state law. If he were to answer, for instance, "Are you engaged in the bookmaking business?" in the affirmative, on those questions alone am I to presume, am I to make the assumption, that it may have a bearing or will have a bearing eventually on the violation of some federal statute? Am I to make that assumption? Because in themselves, per se, they give the Court [204] no criterion as to whether they are relevant. Certainly on the bare record as they are now offered I could not conscientiously say that a federal offense is going to be found out to have been violated, could I?

MR. GOLDSCHEIN: No.

THE COURT: What is my criterion?

MR. GOLDSCHEIN: No, but Your Honor can not certainly say that it can not lead to information with reference to a federal violation, and that is the criterion.

THE COURT: Well, is the possibility of it, is the fact that it could, does the fact that it could lead—is that the criterion?

MR. GOLDSCHEIN: The answer——

THE COURT: I am only asking. Both of you have skirted it. I want to know. What is the criterion I must use to measure whether or not there is relevancy?

MR. GOLDSCHEIN: Well, I don't think, according to the Blair case, that that is a question for the Court until after the investigation is completed.

THE COURT: In other words, it is your position that the Court has no authority to pass on the question of relevancy until the completion, and it should be raised in the conspiracy indictment?

MR. GOLDSCHEIN: Yes, sir; unless—unless—[205] obviously from the face of the question, just as the illustration he used, the answer can not possibly lead to evidence of a violation of any federal statute.

THE COURT: Well, is it as broad as that, that it can not quite possibly lead to the violation of a federal statute on the bare record?

MR. GOLDSCHEIN: That is right.

THE COURT: On the bare record as it is given to me, it is at best a violation of a state offense.

MR. GOLDSCHEIN: True, just as in the Camarata case.

THE COURT: That seems to me awfully broad, because anything can possibly happen in the nature of events, from the most simple thing.

MR. GOLDSCHEIN: True.

THE COURT: And eventuate into the violation of a crime, from the most simple question. Therefore you get two avenues that become so diverse that——

MR. GOLDSCHEIN: The Blair case goes even further than Your Honor goes. It says they have the right to determine that no federal statute has been violated. They go even further—the Grand Jury has the right to make an investigation to determine that no federal law has been violated.

THE COURT: No, that is not further than my [206] assumption. Your assumption is much further. You

make the assumption that because, assuming the answer to be, yes, I am in the bookmaking business—you make the assumption as to its relevancy even though it only verifies the commission of a state offense.

MR. GOLDSCHEIN: No.

THE COURT: Let me finish. Without making the assumption that it can eventuate, that the possibility obtains that it will eventuate into a violation of a federal statute, that therefore it is relevant, and my criterion is the possibility of its eventuation, if that is not so, into a federal offense. Is that the criterion I should use as to relevancy or am I misquoting you?

MR. GOLDSCHEIN: No, if the Court please, its being in the express record does not necessarily mean that he violated a federal offense. The question is whether or not the Grand Jury in asking these questions may develop a violation of a federal offense from anybody, not from the individual himself.

THE COURT: I don't know. He claims it because the crime is personal, and is self-incrimination.

MR. GOLDSCHEIN: That is right.

THE COURT: I say, it is the fact that if he were to answer this question he would admit violation of a [207] state offense which might eventually lead into and tie itself into a federal offense.

MR. GOLDSCHEIN: Yes; the fact that it is a state offense means nothing so far as the federal court is concerned.

THE COURT: That is true.

MR. GOLDSCHEIN: It may be that you are driving an automobile upon a certain street at a certain time. It may well be as innocent as that, because being in the numbers business means nothing in the federal court. The question is, are we going in a direction

that may show the violation of a federal statute, and if we don't have that——

THE COURT: Because of the violation of a state statute?

MR. GOLDSCHEIN: No, not because, not because.

THE COURT: Well, what would you use?

MR. GOLDSCHEIN: Whether the violation—whether or not the particular thing that he was doing could eventually lead to violation.

THE COURT: Well, we are sparring for words. At any rate, the violation of a matter which is deemed an offense under a state statute, you claim, has a certain potentiality that obtains in it——

[208] MR. GOLDSCHEIN: Through the particular facts. The particular facts.

THE COURT: Through the particular facts which makes it possible to eventuate into a federal offense?

MR. GOLDSCHEIN: Yes.

THE COURT: I ask you, does that give an unlimited orbit within which the Court has the power to judge the relevancy?

MR. GOLDSCHEIN: Yes; in order for the Court to determine that a question before the Grand Jury is not relevant it must be obvious from the question itself that it can not possibly lead to anything further than the marital status between a man and his wife, as "Did you kiss your wife last night?"

THE COURT: Well, you reduce it to an absurdity. Apparently there are certainly zones in between that from which he might well argue——

MR. GOLDSCHEIN: Yes; there is no line that you can draw, may it please Your Honor, before anybody can say that——

THE COURT: Why can't I make the assumption that he is in the bookmaking business and has no connection at all with anything that might be a federal offense? Must I make the presumption that he is engaged in something that is [209] conspiratorial rather than that he is engaged in a single violation of a state offense? Now I don't know. I haven't looked into this at all. I am taking it at first blush, and I don't know, but since it has been raised, I am just thinking out loud.

MR. GOLDSCHEIN: Oh, yes, yes.

THE COURT: I don't know. It may well be it is all in vain, but I just don't know.

MR. GOLDSCHEIN: I say this. You have got to have a premise. There has to be a premise to everything that you give as a basis for relevancy. Relevancy can only be an issue when you have a premise. Now the premise would be, "What statute do we have reference to?" We are not bound to disclose that. We do not have to tell a witness what we are investigating. That is exactly what the Blair case says. We do not have to explain.

THE COURT: That is a bit of obiter dictum, you must admit, in the Blair case. They go a bit beyond the issues which it is decisive of.

MR. GOLDSCHEIN: They use that as reasoning.

THE COURT: Yes.

MR. GOLDSCHEIN: They use that as a basis for reasoning.

THE COURT: Was it necessary to the particular [210] issue raised in the Blair case? I won't say it is obiter dictum, but it elaborates beyond the immediate issue.

MR. GOLDSCHEIN: No, the immediate issue is whether or not the witness has the right to challenge the constitutionality of the statute.

THE COURT: That is right.

MR. GOLDSCHEIN: And whether the question is material. They go into materiality of the question in that case, too.

THE COURT: Not in detail, as I remember it.

MR. GOLDSCHEIN: I am pretty sure they do.

THE COURT: You may well be right, but I don't remember it.

MR. GOLDSCHEIN: And they say that a witness can not be permitted to determine that any more than a witness in the court room. The witness can not determine this Court's jurisdiction.

THE COURT: No, no; let us leave jurisdiction out of it; this is a question of relevancy.

MR. GOLDSCHER: Relevancy would be the same question.

THE COURT: No, no.

MR. GOLDSCHEIN: Can a witness say to Your Honor, "That question is not material"?

• • •

[214] . . . Examiner from the Labor Department.

THE COURT: Let us take his example. Suppose he did not keep any, or kept the wrong ones, or false ones.

MR. GOLDSCHEIN: Well, you can go to any length, and say that he did keep the records, but refused to turn them over to the Labor Department. He might have thrown them at somebody and might have killed somebody with them. How far can you stretch it?

Suppose he hit one of these federal Labor Examiners with one of those records and killed him; that would be a violation of a federal statute. How far can you go with these suppositions?

He may refuse to answer because you might charge him with murder here.

You have got to suppose, and the Court must suppose—and you have got to read that from the record—that he failed, that he was in the numbers business. that he had a number of employees. From what I have learned so far before the Grand Jury, they don't have any employees; they are all agents and they all work on commission. This may be different.

Let us suppose now he did have employees, and he does an interstate business and comes under the federal statute—that he has the required number that comes under the federal statute—and that he did not keep any records, or if he did [215] keep them, he failed to turn them in, but if he has this number of employees, he did retain the withholding tax, but did not turn it over to the federal Government, and spent it, and he did make out these forms he was going to send in, but refused to send them in and had torn them up instead; let us go on and show the wilful act. Now how far can this Court suppose from the record?

Is he saying to Your Honor that this man was in the numbers racket, that he did have a number of employees and did not file a return, and for that reason he refuses to answer such a question? Or is the Court supposed to guess those things?

Now he is assuming that we are investigating a violation of the Wage and Hour Law, and that all this will develop if he answers anything. There are two horns to this dilemma. Chief Justice Marshall discussed it in the Willie case, and I believe that is the first case on record, and I don't know whether I have discussed it——

THE COURT: In the Burr Case?

MR. GOLDSCHEIN: In re Willie; that is right. Every witness is obliged to give whatever testimony he has to the courts.

Then we have the other horn of this dilemma, where no man is compelled to give evidence against himself.

[216] There is only one way that these two can be reconciled, and that is for every man to answer all questions propounded to him until some question is asked the answer to which will tend to incriminate him for a violation of a federal statute. It then belongs to the Court to determine from the questions and the answers given.

Now that is the first case, may it please the Court, and the last case is the Mason case, and it also speaks about some supposition that the defendant has that the answer may tend to incriminate, but it says, "A direct tendency to incriminate."

This Court, the Third Circuit, was very definite on that particular proposition in the Camarata case. I don't think there is any confusion in the books. I am not concerned with what Judge Learned Hand had to say in some case where a woman was involved that he did not want to send to jail for some particular reason or other. I don't mean that—I mean those who testified for the woman. I am going to a clear-cut decision—the questions in the Camarata case. The contest was over violation of a state statute, and the court did not read into that some link that might tie him up with a federal violation. He stressed in that case that there might be a violation of the income tax statute. There was an investigation being conducted in the case, and the case so [217] states; that Paul Smith who was then Assistant U. S. Attorney and one of the special assistants from Washington whose name escapes me at the moment, practicing law in New York —they were conducting an investigation to determine

whether there was a violation of any income tax laws, and the very question was set up there—if I answer these questions who I gave this wire service to they might add it all up and find I did not pay sufficient income tax. The Third Circuit said that there is no direct tendency to incriminate, following the Mason case. They said a violation of the state law can not be raised before a Federal Grand Jury, and compelled that answer, and when he refused to answer, found him guilty of contempt.

MR. KOSSMAN: I honestly hate to take any more time, but I will take just two minutes.

MR. GOLDSCHEIN: I think he likes it.

MR. KOSSMAN: In the first place, the Court must take judicial notice of the fact that every employer in the country must file Social Security for one employee, if you are in business, withholding tax, and the Court knows it is a federal crime not to pay Social Security, unemployment, federal unemployment, and whatever other laws there are pertaining to an employer.

Today, to ask a man if he is in business—of course, if he is not in business, he simply says he is not in [218] business, but if a man is in business and has not made a return, that is incriminatory. He knows that. He would be the first one to prosecute a man for not paying Social Security tax.

THE COURT: Yes, but the answer to that question——

MR. KOSSMAN: The answer to that question—if a man is in business—legal—forget about illegal—he has to pay federal taxes on state business. If a man is a plumber, if he has employees, and never filed a return——

THE COURT: You can not ask him what his business is?

MR. KOSSMAN: If you ask him today, "What is your business," I say that under the present state of law he can refuse, and if he hadn't filed and paid Social Security and all the rest of the stuff—otherwise they would prove he is in business.

THE COURT: Oh, you talk about that, you say it is in the record that he didn't pay Social Security——

MR. KOSSMAN: Well, of course it is not in the record.

THE COURT: You are raising the same question that was raised in the Hoffman case.

MR. KOSSMAN: What case?

• • •

OCTOBER 17, 1950.

[307] . . . you need him this afternoon?

MR. GOLDSCHEIN: We have had him waiting now for some——

THE COURT: Do you need him for this session? It is a fairly legitimate request of counsel. He is engaged. Of course, I don't want to hold this Grand Jury up.

MR. GOLDSCHEIN: But will he come back Thursday?

THE COURT: I will set it for Thursday. If either of counsel have any——

MR. WITKIN: I will not have any objection, may it please Your Honor.

THE COURT: Mr. Kossman?

MR. KOSSMAN: No, I never have.

Just a moment, Mr. Goldschein, you have been subpoenaed to produce certain records concerning the investigation of Irving Greenberg. I don't think it is funny, either.

THE COURT: Mr. Kossman, let us not indulge——

MR. KOSSMAN: No, no.

THE COURT: Let us not indulge personalities here.

MR. KOSSMAN: I am sorry.

THE COURT: It does not become lawyers of your status.

MR. KOSSMAN: I am sorry, if the Court please, [308] if my remark was out of order.

THE COURT: What is your request?

MR. KOSSMAN: Mr. Goldschein was subpoenaed this morning to appear here at eleven o'clock, with subpoena duces tecum to bring with him all records concerned with the investigation of Irving Greenberg, and in connection with the examination of Irving Greenberg, in the examination before the Grand Jury, and in connection with the examination of other witnesses who have appeared before the Grand Jury and have testified about Irving Greenberg. He is now in default unless he explains his action to the Court.

It is yours, Mr. Goldschein.

MR. GOLDSCHEIN: No. I am not laughing because it is funny; I am laughing because it is sudden.

May it please the Court, in the first place, he is calling for Grand Jury records; he is calling for testimony of witnesses before the Grand Jury; and Mr. Kossman knows, I am satisfied, that we have no control over Grand Jury testimony; that the only one who can make that public is the Court; and the only one who can give it to him is the Court.

Now, not only that, but we intend, when the question is properly brought before the Court, to resist Mr. Kossman's having any of the testimony of the Grand Jury or any information in the custody or possession of the Department of [309] Justice. Whatever I have

are not records of M. H. Goldschein, but M. H. Goldschein as Special Assistant to the Attorney General, which means an agent of the Department of Justice, and neither the Department of Justice nor the Attorney General intend to let Mr. Kossman have any of its records, and I think at the proper time the question will be argued and discussed before the Court, when that particular issue arises.

MR. KOSSMAN: Are you finished?

If the Court please, the issue arises now, and on the same issue a federal judge sentenced an F. B. I. agent for contempt. I am prepared to argue the legal point now, but I don't want to interrupt the proceedings. I will prove conclusively that under the law he must bring—I had asked him specifically about the Grand Jury records; I asked him about records relating to the investigation of Irving Greenberg, and I ask Your Honor, on the basis of all the decisions, if Mr. Goldschein refuses to produce the records, that you hold him in contempt of court.

MR. GOLDSCHEIN: Yes, sir; I think the Court ought to.

MR. KOSSMAN: This is a quest for a Court order. I am prepared to argue it, and I think Mr. Goldschein should be held in contempt if he refuses the records, because under the ruling he has the right to ask the Attorney General [310] whether he should bring it or not, and he comes here at the request of the Attorney General saying that he doesn't want to, but he must bring the records to this Court for the Court's examination, and for the same failure the F. B. I. agent in the Chicago case was held in contempt. The Circuit Court reversed the conviction, but on a different ground than Mr. Goldschein has presented; but certiorari was granted and it is now pending before the Supreme Court.

Judge Kirkpatrick, in an admiralty case, ruled that whenever the United States is a party—and they are a party in this particular case—they must produce the records; they are in no different situation than any litigant. That is the issue before the Court at this moment, and there is no reason for delay. I don't want to delay this proceding.

THE COURT: We will set this down for ten o'clock tomorrow morning. I would like some briefs from both of you.

MR. KOSSMAN: All right; I have in the past always submitted briefs, Your Honor.

I certify that the foregoing is a correct transcript from the record of procedings in the above-entitled matter. October 17, 1950.

.....
Court Reporter.

• • •

OCTOBER 18, 1950.

[312] THE COURT: Is this a motion to quash?

MR. GOLDSCHEIN: Yes, Your Honor.

MR. KOSSMAN: If the Court pleases, in view of the fact Mr. Goldschein has filed a motion to quash, no doubt he will present argument in behalf of that motion. Then I will answer him. Is that the procedure that you desire? Technically speaking, there is a subpoena outstanding which he didn't comply with yesterday, and there is now a postponement until this morning. He has filed a motion to quash. Therefore, he will have to argue in support of that motion to quash.

THE COURT: I think that is right.

MR. GOLDSCHEIN: We will rely on the brief, may it please Your Honor; we don't care to argue. I assume then there will be no argument.

MR. KOSSMAN: Oh, there is going to be argument. If you don't want to argue, that doesn't——

THE COURT: We can't foreclose counsel from argument.

MR. GOLDSCHEIN: I thought he wants to answer me.

MR. KOSSMAN: If you say nothing, it will be easier to answer you.

Now, if the Court pleases, there is now pending [313] a motion to quash the subpoena duces tecum commanding Mr. Goldschein, in his capacity—notwithstanding what the newspapers said—as a Special Assistant to the Attorney General—now, is it agreed that the subpoena was to you as Max H. Goldschein, Special Assistant to the Attorney General?

MR. GOLDSCHEIN: Oh, in my official capacity, yes.

Is there a time limit on this, Your Honor?

THE COURT: How much time do you want, Mr. Kossman? A half hour? Twenty minutes?

MR. KOSSMAN: I think it will be less than a half hour.

THE COURT: All right, twenty minutes.

MR. KOSSMAN: This point is too simple. A subpoena duces tecum was issued as to Max H. Goldschein, Special Assistant to the Attorney General, directing him to testify on behalf of Irving Greenberg and bring with him all records concerned with the investigation of Irving Greenberg used in connection with the examination of Irving Greenberg as a witness before the Grand Jury, and in connection with the examination

and questioning of other witnesses who have appeared before the Grand Jury and have testified about Irving Greenberg.

That is the nature of the subpoena duces tecum.

• • •

[329] . . . Mr. Goldschein knows it is so clear—there are two alternatives. Number 1, you must adjudge Mr. Goldschein guilty of contempt of court and sentence him. And if he wishes to test that, I have no objection to bail being entered, because it is a bailable offense. Or, number 2, you can direct Mr. Goldschein to stop the prosection of Irving Greenberg.

THE COURT: In all those cases—now, I just received your brief, but I have a cursory knowledge of them—are they not all cases in which the Government is a party?

MR. KOSSMAN: The government is a party tomorrow.

THE COURT: No, it is not a party in the same sense. The Grand Jury is an arm of the court.

MR. KOSSMAN: If the Court please, in the Zwillman case, it was the same proposition involved.

THE COURT: No, in the Zwillman case there was an offense charged against him.

MR. KOSSMAN: Contempt of court. It was a contempt of court for refusing to answer Grand Jury questions. Now, I call Your Honor's attention to the fact that you shouldn't think that——

THE COURT: This wasn't a contempt proceeding—there is nothing——

[330] MR. KOSSMAN: There is a contempt proceeding present tomorrow.

THE COURT: Well, now, just a minute. When we get to tomorrow, there is another question involved.

MR. KOSSMAN: Well, if the Court will let me read Rule 17 (c)—I thought that the case was coming up today. As a matter of fact, I was prepared. But we will skip that. Court Rule 17:

"The court may direct that books, papers, documents or objects designated in the subpoena"——

You see, that is your privilege, Your Honor——

"be produced before the court at a time prior to the trial, or prior to the time when they are to be offered in evidence, and may, upon their production, permit the books, papers, documents——"

I did it the fair way. If I had come in tomorrow morning with this, he would have said Mr. Kossman is stalling again, or inching. And just along that line, if Your Honor will allow me, I want to let this court know that, as a matter of fact, it is the tactics of Mr. Goldschein that are absolutely delaying and wasting not only taxpayers' money, but even causing great injustice. Why do I say that? Because in every case where Mr. Goldschein instituted contempt proceedings in the West, I don't know how many people were [331] involved but in every single case, where men were found guilty of contempt, in every case the Circuit Court reversed, and in one case where they didn't reverse, the United States v. Rogers, I don't know if he tried that, but certiorari has been granted.

Now, who is wasting time, taking up the time of the Court, rushing pellmell in order to get quick decisions, and then finally having the Circuit Court reverse, to be sent back again? I submit that when I want time for independent research and study that I am saving the time of the Court, because if, as the result of my independent researches I came to the conclusion there wasn't merit to this case, I wouldn't be here arguing it.

Thank you very much.

THE COURT: Do you wish to be heard, Mr. Goldschein?

MR. GOLDSCHEIN: I would like to make a distinction between the cases cited by Mr. Kossman. Firstly, he read to Your Honor Rule 17 (c). He didn't read the whole rule. There is only part of it that pertained to his argument. I would like to read the whole of it.

"A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court, on [332] motion made promptly, may quash or modify the subpoena if compliance would be unreasonable or oppressive."

And we say as a matter of law the subpoena should be quashed, and we have submitted a brief. And the difference between our contention in the brief and Mr. Kossman's is this, that in all the cases that he cited wherein the particular rule or order of the Attorney General was referred to, they are all criminal prosecutions wherein the Government is a party defendant, and they are all discussed in the Ragen case, that Mr. Kossman referred to.

The court analyzes them all, refers to the case of Judge Kirkpatrick, from this district. In that case, particularly, Judge Kirkpatrick said:

That is a maritime case—that the United States Government waived any particular right under that rule; that it was a party to the lawsuit, and under the maritime law the United States Government was a party just like any other party, and the statute so provided, and Judge Kirkpatrick limited his decision to that particular set of circumstances.

Now, right now we have a witness before the Grand Jury. Now, certainly, the Grand Jury is no part

of the executive branch of the Government, it is an arm of the court, and held so by every circuit in the country, at one time or another. Certainly, this circuit has held that the Grand Jury . . .

• • •

[339] . . . of justice."

And then further on:

"Certainly this language contemplates circumstances when the material called for must be submitted to the court."

He has to admit he is a defendant tomorrow. I did him a favor——

MR. GOLDSCHEIN: I am not admitting I am a defendant.

MR. KOSSMAN: He is not a defendant.

MR. GOLDSCHEIN: Who is?

MR. KOSSMAN: Mr. Greenberg.

MR. GOLDSCHEIN: No, he is a witness before the Court on a question.

MR. KOSSMAN: Not tomorrow. I did you a favor that I am arguing this thing—when I say I did you a favor, I did the Court a favor by bringing it to your attention today instead of tomorrow, otherwise he would say I am pushing him.

THE COURT: What label would you put on the contempt proceeding?

MR. GOLDSCHEIN: There is no contempt proceeding . . .

• • •

[341] THE COURT: The determination eventuates from the hearing. When do contempt proceedings start? When the judgment of contempt is pronounced from the Court. Doesn't it eventuate from this proceeding that he will be held in contempt or that he will not be?

MR. GOLDSCHEIN: No.

THE COURT: Why?

MR. GOLDSCHEIN: The Court may rule on the showing of the witness that the answers would tend to incriminate him and he is not compelled to answer.

THE COURT: He can either show that, or that he has not shown the contempt, and therefore he should be adjudged——

MR. GOLDSCHEIN: No; therefore ordered to go before the Grand Jury and answer.

THE COURT: Yes, and then the presentment be made.

MR. GOLDSCHEIN: If he refuses to follow the order of the Court. He has not refused up until now. All he wants to do is an opportunity to show the Court that there is a direct tendency to incriminate.

THE COURT: When will the contempt proceeding start against him, after his refusal with the Grand Jury to answer?

• • •

[345] . . . Honor well knows that, so therefore it falls within the line of all those cases that say it is a criminal proceeding.

However, he told me I have nothing to be afraid of. I will take his word for it, and then when tomorrow Mr. Greenberg comes I want it to be understood that he is not coming for the purpose of being tried in contempt, he is going to be given the questions and we are going to go to the proof.

THE COURT: I think that is well taken. You agree with that, don't you?

MR. GOLDSCHEIN: That is the statement I originally made to the Court.

MR. KOSSMAN: But I wish it, I wish to have it expressly noted on the record that I am asking these records to be produced in order to help me to go to the proof. Why must I wait until the second bite takes place? Why can't I have it the first? The rules provide. It is a criminal proceeding, a Grand Jury proceeding is.

It might be more convenient for Mr. Goldschein not to, but his convenience isn't important. Don't forget, it is the defendant's interest that is paramount in this case.

MR. GOLDSCHEIN: What defendant?

THE COURT: You can't have it in any respect.

MR. KOSSMAN: I beg your pardon?

THE COURT: They are to be submitted to the . . .

• • •

OCTOBER 19, 1950.

[390] THE COURT: All right, Mr. Kossman. Commissioner Witkin. Didn't I see him here?

Do you want to be heard, Mr. Kossman?

MR. KOSSMAN: Yes. If the Court pleases, I am sorry I didn't call attention to the Court specifically that under Rule 12 (b) of the Federal Rules of Criminal Procedure entitled "The motion raising defenses and objections: Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion."

And this rule repealed all the prior rules and reference to plea and abatement and challenges re to the Grand Jury and so forth.

There is presently under advisement by the Court a motion to cite Mr. Goldschein for contempt for fail-

ure to produce records—not Grand Jury records, records dealing with the investigation. That is under advisement.

Certain legal phases of it are now pending before the United States Supreme Court. I called Chicago yesterday and the attorney for the petitioner was kind enough to send me his preliminary brief, and I hand it to the Court.

THE COURT: Is that in the contempt proceeding?

MR. KOSSMAN: Yes, in the contempt proceeding. And when the main brief will be filed I will bring it to Your

[391] Now, therefore, from a strict procedural standpoint, and again I have to say because anticipating Mr. Goldschein will talk about the delay, from a strict procedural standpoint in view of the fact that you have taken under advisement that motion to ask Mr. Goldschein to produce the records—and I am not limiting those records for the purpose of showing that certain questions are incriminatory, I mean it is much greater than that—I will state for the record that since Greenberg is facing a criminal prosecution for contempt for failure to answer certain questions before the Grand Jury, it is Greenberg's contention that although termed the witness for the Government actually he has been investigated by the Government, is presently the subject of an investigation by the Government for the Grand Jury; and Mr. Greenberg further contends that the answers to the questions propounded to him before the Grand Jury are known to the prosecutor for the Grand Jury, and under ex parte Hudgins case a proceeding for contempt couldn't even be entertained where the prosecution knows the answers, because obviously there could be no obstruction of justice. Obstruction of justice is if you keep something away—

even Mr. Goldschein to his sorrow knows that. If you commit perjury that is not an obstruction of justice. So refusing to testify, which is infinitely less than testifying falsely would certainly per se not be an obstruction of justice.

[392] Furthermore, we contend that the evidence that is in the possession of the Government has been obtained by unconstitutional methods. And for these reasons I have subpoenaed the records which are now in the possession of Max H. Goldschein, the present Assistant Attorney General, and which are used as a basis for his questioning before the Grand Jury, and which are also used as a basis for the questioning of other witnesses before the Grand Jury in matters relating to Greenberg.

That is the legal reason for the issuance of the subpoena duces tecum.

He filed a motion to quash. That is before Your Honor at this moment under advisement. Can we therefore proceed? It seems to me we can not.

THE COURT: We certainly can, there is no question about it. I am going to defer ruling on the motion to quash because I have no criterion. You have to make a showing. You can call Mr. Goldschein; you can call your witness then. This isn't a contempt proceeding. You are laboring under a misapprehension. This isn't the contempt proceeding. I don't know, you may know, but I don't know whether he is going to be held for contempt at all. I don't know at this stage. There may be a showing, you may make one. There may be a showing that he is in reasonable apprehension, and until you make that showing [393] I have no criterion to say whether or not you have any right or I have any right to request the Attorney General to produce the records.

MR. KOSSMAN: Believe me, Your Honor, I am most anxious from a practical standpoint to go forward, but from a legal standpoint in view of the fact that this is a——

THE COURT: Let us not argue about this.

MR. KOSSMAN: Have you decided about that? Well, I take an exception to Your Honor's refusal to postpone the giving of proof by the defendant as to the reasons why the questions are incriminatory.

THE COURT: All right.

MR. KOSSMAN: There is another problem involved before we come to the main thing.

There were ten questions that were submitted and perhaps a general rule on this may expedite matters for all future witnesses. Mr. Goldschein submitted about ten or twelve questions to us.

MR. WITKIN: More than that.

MR. KOSSMAN: Fifteen, whatever they were at that time.

THE COURT: Let me see them. Unfortunately I don't have them here. Have you the copy here?

MR. KOSSMAN: Mr. Greenberg went back——

* * *

OCTOBER 20, 1950.

[405] THE COURT: All right, Mr. Kossman.

MR. KOSSMAN: If the Court pleases, a philosopher has said that tact consists of knowing how far to go and not going too far, and I shall try to be very tactful in my presentation of the argument.

Now, if the Court pleases, in the previous argument in the same type of case but different counsel, the Court asked counsel about certain cases involving relevancy.

Now, this is the thought without stressing it too much, that I would like to put to the Court in regard to the question of relevancy. In an ordinary trial counsel asks the witness a question and there is an objection and the Court is asked to rule on the ground of whether it is relevant or irrelevant. Once you have ruled counsel can't go running and taking an appeal. That is finished business so far as the course of the trial is concerned. You have ruled, but there is a difference between the right to ask an irrelevant question and the power.

Now, I think the confusion lies in the sense that admittedly he has the power to ask irrelevant questions. No one can stop him.

THE COURT: Let me ask you what this argument is directed to now.

MR. KOSSMAN: The argument is directed to—[406] everything that I say is based on the questions that have been asked to attack him on the ground that they are utterly irrelevant. The relevancy will only take four or five minutes to argue.

MR. GOLDSCHEIN: May I at this time suggest that I think the Court ruled——

THE COURT: I have ruled on it. I have read the brief. I have read——

MR. KOSSMAN: If the Court please——

THE COURT: I don't want to go into re-argument.

MR. KOSSMAN: You don't want to go too much into the question of relevancy? I just wanted to call the attention of the Court because you said there wasn't a single case involving relevancy, and I wanted to call Your Honor's attention to Rule 1 of the Federal Rules of Criminal Procedure, stating that the rules that govern the procedure in the courts of the United States are for all criminal proceedings and of course the

Grand Jury is a criminal proceeding. Therefore, he is governed by the rules of relevancy.

He doesn't have unlimited power, and all the cases say we don't have dictators in Grand Jury rooms.

From a single case of mine that I have cited he has one sentence, one sentence he has culled out of that Blair case, and with that sentence he looks to ask the questions. [407] I just want to call that to the attention of the Court. Wigmore on the question of contempt says where there is an obstruction of justice where a witness refuses to answer before a Grand Jury——

THE COURT: Just a moment. You are getting confused. This isn't a contempt proceeding. You aren't in contempt. I have read what Wigmore said. This proceeding is not on that theory. We aren't in contempt yet.

MR. KOSSMAN: Coming to the questions, this is interpreting the cases in the light of the questions, it has been stated by counsel for the Government that he relies tremendously on the Camarata case as authority for the contention that Greenberg wasn't privileged to refuse to answer these certain questions.

Now, I admit the Camarata case is very strong, but I will also point out to Your Honor that it doesn't apply to this case. It may apply to other cases of other defendants, but as far as this case is concerned it is absolutely—it absolutely has no bearing.

I will point out to you in the Camarata case there was a regular Grand Jury, not a special Grand Jury, as we have here. In other words, the scope of the inquiry wasn't unlimited as it is here. It was simply a regular Grand Jury, and they subpoenaed Camarata as a witness.

[408] Now, when we analyze the questions that Mr. Goldschein has asked Greenberg, it is most amazing to appreciate the fact that he isn't asking these questions as a man would normally ask a witness. He is asking questions as if it is on cross-examination, continually digging into him, continually digging into him, and it is obvious there is a reason why he is digging into them. I am not gifted as a prophet, Your Honor, but I can see where six or eight months from today where there will be indictments for income tax violations where Mr. Goldschein will pick up the transcript of the Grand Jury and say to the man, "Didn't you admit that you used the telephone?" And then argue to the jury under the law of conspiracy because it is very strong where two or more persons have conspired against the United States everything said by each of them at the existence of the conspiracy in furtherance of it will be admissible.

It will be too late for Mr. Greenberg to come around to Your Honor and say, "You told me it wouldn't incriminate me."

THE COURT: Do you mean to stand here and tell me and say when he is asked about using the telephone he has a right to refuse to answer before the Grand Jury?

MR. KOSSMAN: I am going to show the circumstances, if Your Honor please.

• • •

[427] . . . there agree with me, now we come to '50.

Now, Mr. Goldschein would be right on '50 on the theory that until March of 1951 we have filed no returns and therefore he said, "What could you have violated? Nothing." He is all wrong.

I want to read you and quote from the famous case of United States v. Spies by way of illustration,

such as keeping a double set of books, not applicable here, making false entries, likewise not applicable here, or false invoices or documents. The legal effect of covering up a source of income, and then we come to the meat of this case, handling of one's affairs to avoid making records. The usual thing in transactions of the kind, the legal effect of which would be to mislead or to conceal. If the tax evasion motive plays any part in such conduct the offense may be made out.

Now, take that statement, let us take 26 U. S. C. A., Section 1625 (a) and 1626 (a), (b) and (c), and what do you have?

The failure to withhold the tax, the failure to withhold Social Security payments, the failure to withhold unemployment compensation payments, the failure to keep records, the failure to have records, the failure to say to the Government, "My gross income was such and my net income was such, and therefore the balance is such." My gross expenses are such and the net income is such.

[428] For 1950, we are compelled to answer the question we are in business. Now, I know Your Honor isn't going to say that when I admit that I am in business that I am not almost necessarily follows, and yet if I am in business and if I employ people—let us say that Greenberg has to admit he is in business, whether that be of a running a drug store or the numbers business or anything else and that since January 1, 1950, he has kept no records and paid no withholding tax and paid no Social Security tax. My heavens, may it please Your Honor, that man is putting his neck in the noose because the minute he answers the question he is incriminating himself by saying, "I have got to do one of two things now, either go back and make phony records and avoid going to jail and trying to palm them off on the Government or I violated Section (a),

(b) and (c) of 1626 and Section (a) of 1625, and furthermore, I violated the law that was handed down in the United States v. Spies. I violated Section 145 (a), (b) and (c)", so that I say to Your Honor that where a man is in a business absolutely, regardless of the type of business, and I don't want Your Honor to assume he is in any business, the presumption may be clear.

I say this to Your Honor in addition. I have been practicing at the bar for thirty-one years. In my judgment as a member of the bar I have spoken to Mr. Greenberg . . .

• • •

[436] . . . I offered here to show what he did do in his income tax case. I don't know that. And I don't think it was in the Camarata case. Second of all, there, they didn't ask him every question you read. Every question you read was a particular question as to whether he furnished certain things. It wasn't the question of "Are you in the numbers business?" For example, we answered about 1133 Diamond Street. Mr. Goldschein asked question upon question. Remember, we answered hundreds of questions, hundreds of questions before this Grand Jury. We didn't willy-nilly refuse to answer them all. But the ones pertaining to the operations of the numbers business——

THE COURT: Silence sealed his lips.

MR. WITKIN: If I may be somewhat critical of Your Honor's trend of thought to Mr. Kossman, you said, "Must I assume that he is in the numbers business?" And yet on the bench here, as you talk to me, and I say this with perfect respect, Your Honor says to me, "when it came to his numbers business."

Well, you see, in the back of Your Honor's mind is, "He is in the numbers business." Maybe he is. I am not saying he is not, I am not saying he is. But,

you see, in that Camarata case, those questions were specific questions. . . .

• • •

[454] . . . Supreme Court said that the direct answer couldn't tend to incriminate him in that case. And that is the pattern that Your Honor I am sure will follow, the Mason case, the Camarata case.

THE COURT: That is right, in the Mason case and the Camarata case. Now here, of course, for 1950 he has not said so, but he said so in the previous years, that he was only in one business.

MR. GOLDSCHEIN: No, he only listed one business but then——

THE COURT: "Miscellaneous."

MR. GOLDSCHEIN: "Miscellaneous" and——

THE COURT: And paid the tax for those miscellaneous businesses.

MR. GOLDSCHEIN: Yes. So there can't be any intent to defraud the Government there when you pay it.

THE COURT: No, but they have limited it to the violation of 1625 and 26 A and B in 1950.

MR. GOLDSCHEIN: Which means what?

THE COURT: To those sections, 1625 and 1626, failure to file withholding tax section.

MR. GOLDSCHEIN: Withholding tax for whom? Is the Court supposed to assume that he has some employees who work for him? If he is, here is how far we would have to go. You have got to assume first that he is in the numbers [455] business, one. Then you have got to assume that he has some employees in that numbers business, and that he doesn't pay any tax for those, don't withhold a tax for those.

Now, in the first place where are the three assumptions to come from? From what can the Court assume that he has some employees?

How is the Court to arrive at that? When it is commonly known that in the numbers business you don't have employees. They all get their cut; the banker gets what they all turn over to him. Up the line from the numbers writer to the pick-up man, each withholds what is coming to him at the time he has got it in his hands.

THE COURT: Well, do you predicate it on the fact that there are no employees in the numbers business?

MR. GOLDSCHEIN: Yes.

THE COURT: Suppose he said, suppose the question asked him: "Were you in the automobile business" and he is presently in the restaurant business, and it only showed a return as a direct business for the restaurant business, would the fact that there were employees in his business, in the automobile business, which was common knowledge that there were employees, would he be then within his right?

MR GOLDSCHEIN: He may be there. Certainly Your Honor can't take judicial knowledge of the fact that the numbers has employees.

* * *

[458] * * * I haven't withheld any money, and if I answer that question I might incriminate myself."

THE COURT: No, but if I have employees——

MR. GOLDSCHEIN: If you have employees, yes, sure, there isn't any doubt about that; if you pay them a certain salary——

THE COURT: It is getting time for luncheon. Let me ask you this, is he willing to take the stand and testify that he has no employees?

MR. WITKIN: Well, Your Honor——

THE COURT: I think there is a good bit to be said, it is getting down to the refinement that we ought to have gotten to a long time ago.

MR. WITKIN: Before I answer, Your Honor, I am anxious that, as I think Your Honor knows—have you finished, Mr. Goldschein?

MR. GOLDSCHEIN: Yes.

THE COURT: Suppose we hold it up, unless this is short, until after lunch.

MR. WITKIN: Can I give you one thing to think about at your lunch?

What Mr. Goldschein has not answered, and I want to give him time to answer it, he has forgotten all about the fact that we incriminate ourselves if we answer the questions that we have kept no records of any kind if we have . . .

• • •

[471] . . . records for the purpose of defrauding the Government. You have got to read the whole thing.

THE COURT: I am not familiar with it.

MR. KOSSMAN: I would like to put this on the record. I understand that there are members of the Grand Jury who have been sitting in this room listening to this discussion about Mr. Greenberg. Now, if that is so I move that the Court discharge Mr. Greenberg as a witness before the Grand Jury.

THE COURT: Are some of the Grand Jurors here?

MR. GOLDSCHEIN: Yes, sir, the Grand Jury is here.

MR. KOSSMAN: The Grand Jury have listened to this argument. I move specifically, Your Honor, that Mr. Greenberg be dismissed as a witness before the Grand Jury. I think it is a most wilful and incriminatory process to allow the Grand Jury to listen to these discussions of things that are said in the legal fashion that may be apart from the factual standpoint. You never have members of the Grand Jury or a petit jury listen to legal argument. I didn't know it until my attention was called to it just at this moment. I make that formal motion.

THE COURT: I didn't know it, but the motion will be denied.

[472] MR. KOSSMAN: I will take an exception to that.

THE COURT: What is the citation in the Spies case?

MR. KOSSMAN: 317 U. S. 492.

THE COURT: I will read it. It is now one o'clock. I have a number of things to do this afternoon. I think we better let this go over until Monday morning.

MR. WITKIN: If Your Honor please, could you make that at eleven o'clock Monday morning?

THE COURT: All right.

(Adjourned until Monday, October 23, 1950, at 11:00 A. M.)

* * *

OCTOBER 23, 1950.

[505] THE COURT: Now, Mr. Witkin, I have looked at those regulations. There are none of them as I read them—suppose he was working for somebody. Those returns wouldn't have to be filed until the end of the year under the statute. He could make out his return then. There is nothing for him to be afraid of.

MR. WITKIN: Your Honor, I am waiting for a couple of books to come up. I just had somebody drive me down. I have the books downstairs.

May I say to Your Honor that I think you are in error on that for the simple reason that your withholding tax, for example, you can't wait until your return. You are supposed to deduct your withholding tax. There is no such thing as permitting any employee, for the sake of argument, to work for you from January until October and then not withhold that tax. You are supposed to pay, the same as your Social Security tax and your unemployment.

THE COURT: If you don't pay it you can pay it.

MR. WITKIN: No, you are liable the minute you pay your employee his money without withholding the tax, you have violated the law.

THE COURT: Before we get to that section of it, there is no evidence here that he has any employees. I am not going to take any judicial notice one way or the other of [506] the operation of the numbers racket. I don't know enough about it.

MR. WITKIN: I am going to put him on the stand, if Your Honor please.

THE COURT: I was going to suggest that. Why don't you put him on? We are all talking. When we hear from the lips of the witness we won't have to indulge in any presumptions as to what exactly your position is.

MR. WITKIN: There is just a couple of points, if Your Honor will just indulge me a couple of minutes, that I wanted to argue to Your Honor before I put him on. However, I can do it out of turn.

I am going to say to Your Honor very frankly that I prepared a statement for him which he will swear to, and I will produce him. Then I have a couple of matters that I would like to read to Your Honor from the Spies case and also from the Camarata case.

Your Honor just said that you aren't going to take cognizance of the fact that a person who might be in an unlawful business has or has not employees. I am very frank to say I agree with Your Honor on the law on that subject, but I would like to call Your Honor's attention to this.

In the Spies case that Mr. Goldschein seems to make little of, I want to call Your Honor's attention to [507] the fact that what that case decided, what it also

decided that the person who was charged with committing a felony had only committed a misdemeanor, but that which I read to Your Honor the other day and I read it again is what the Spies case really holds, and that covers our argument in this case. Where it says that "An affirmative willful attempt"—I am reading from pages 364 of 63 Supreme Court Reporter, "An affirmative willful attempt may be inferred from conduct such as keeping a double set of books," and a few other things, and then it says "Concealment of assets or covering up source of income, handling of one's affairs to avoid making the records usual and transactions of the kind, and any conduct, the likely effect which would be to mislead or to conceal."

Now, suppose this witness, and I am taking the exact verbiage of the Spies case, admits he is in business and suppose he kept no records. He gets on the stand and he tells Your Honor he is in business. If he kept no records he violated the law.

THE COURT: What section is he going to violate?

MR. WITKIN: That would be Section 145.

THE COURT: Have you got the sections there? I know I looked them up. He has until the end of January.

MR. WITKIN: No he hasn't. It would be 145b.

THE COURT: All right.

[508] MR. WITKIN: 145b.

THE COURT: That is the section?

MR. WITKIN: Yes. Mr. Kossman calls my attention to the fact that Social Security tax of course is paid quarterly, has to be paid quarterly. To answer Your Honor's specific question, that is Section 145b.

Now, there is nothing that he can do between now and March of 1951 to correct that.

THE COURT: It says the end of January.

MR. WITKIN: No.

THE COURT: Let me get it. Let me look at it. I will read it to you. I read it. I can be wrong. Have you the federal statutes with you?

MR. WITKIN: Here is Section 145b.

THE COURT: This is not the section I mean.

MR. WITKIN: While Your Honor is looking at that, taking that section and coupling it with the Spies case, which is very clear, what do you have? You have this situation. Here is a man who on October 23 is before the Grand Jury, and for the sake of argument he is asked whether he is in business and he is compelled to say that he is in the business other than the—he has an additional business other than the business set forth in his return. In his return, he will testify to the fact that his return he says "Miscellaneous" and doesn't state any other [509] business. Now, he has kept no record of that other business, whether it be lawful or whether it be unlawful. Now, if he has not kept records, then he is guilty. If he is not, he is guilty of attempting to conceal under Section 145b and under the exact verbiage of the Spies case. You can't get away from it, no matter which way you turn or how you turn. That is what it says.

THE COURT: Here is Section 1625.

MR. WITKIN: I don't mean that section, for the moment.

THE COURT: "Any person required of this chapter to collect or pay over any tax approved by this chapter who willfully fails to collect or pay over or any person who willfully attempts in any matter to evade or defeat any tax imposed by this chapter or the payment thereof."

Where is there anything violated of that now? He can at the end of the year.

MR. WITKIN: Mr. Kossman gave me an argument and I don't agree with him——

THE COURT: I think counsel ought to agree.

MR. WITKIN: What Your Honor has just read, and I don't have it in front of me—if you will give it back to me I will read you what you just read and show you where we come in on that.

THE COURT: The section I read gives them [510] to January 31 of the succeeding year.

MR. WITKIN: You are talking about some other tax. You aren't talking about withholding tax. You asked me what section we violated here when we answered we were in business in the Spies case. I said to you "145b." Your Honor read it and then Your Honor read this. "Any person who willfully attempts in any matter to evade or defeat any tax imposed by this chapter or the payment thereof."

Now, the Spies case in interpreting 145b definitely says that any man who keeps a double set of books, makes false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind."

Now, a man in business must keep records.

THE COURT: That is right. I agree with that.

MR. WITKIN: All right. Now, if I put him on the witness stand and he has to say, "I am in a business in addition to the business that I have set forth in my income tax return," forgetting for the moment that I am subject to the general false statement statute of the Federal Government—forget that—I will come back to it, but let us forget it. What have I done?

[511] I have said to you I am in a business other than what I said in my income tax. Being in business if I haven't kept records of that business that are the usual records, that are the necessary records, that are required under 145b, the records that the Spies case says I have to have, then I know I am incriminating myself under the federal——

THE COURT: No.

MR. WITKIN: Why not.

THE COURT: He doesn't have the records now. He hasn't got anything now. Suppose he hasn't got any records. He can later file records.

MR. WITKIN: How can he have records if he knows he didn't make them? Make up phoney records?

THE COURT: No, he can give the best judgment he has got.

MR. WITKIN: No, he isn't allowed to give the best judgment he has got.

THE COURT: That regulation says he has until the end of the year.

MR. WITKIN: Which section are you talking about now?

THE COURT: I am talking about 1625b. He has until January 31. "On ore before January 31 of the succeeding year." Now where is he now?

MR. WITKIN: The difficulty in arguing with [512] Your Honor is this. I point out two sections that he is violating. Let us assume for the sake of argument in the absence of my knowing about the regulations that when you are talking about that you are right on that, but if on two sections I am right, I don't have to prove that he is guilty of the violation of all the federal statutes.

If under the general false statement statute he is wrong, he incriminates himself when he says he is in business other than set forth in his income tax return, number 1, and then in addition to that, he has failed to keep the records, and Your Honor says that he can make up the records. No, he can't. Then he is doing a worse thing.

In other words, if you say to him, "Look, you have kept no records since the first of January until October 15. Now your return is coming along in March. You make up the best you can."

We aren't allowed to make up the best we can. The law says that I have got to keep records usual to the conduct of my business and if I haven't kept them I know I am incriminating myself.

THE COURT: You show me the regulations, I want to see them.

MR. WITKIN: There is no regulations. I am reading the case.

THE COURT: Spies hasn't anything to do with [513] keeping records.

MR. WITKIN: Certainly it has.

THE COURT: All it says unless the Government finds, proves and shows that it was done willfully he is not guilty of a felony.

MR. WITKIN: It says "In the handling of one's affairs to avoid making the records usual in transactions of that kind."

THE COURT: You show me one regulation or one statute which requires him now to have kept books and records and then if he hasn't done it that he can't in anywise, like, for instance, an estimated tax return. You can change your return if you have estimated.

MR. WITKIN: If Your Honor please, Mr. Kossman calls my attention, but before I come to that Your Honor is now asking me to show you the regulation requiring a man who is in business who fails in the regular course of his business to keep records imposed upon him by law.

I say to Your Honor very frankly and most respectfully that in my opinion that isn't the issue, because there doesn't have to be a regulation where the law is clear. The reason there has been no regulation on him to keep the records is because the law is mandatory that he must keep records. In other words, the only time regulations are adopted is when a section isn't clear and where they want to clarify it. [514] Here it is clear, and the Spies case, Your Honor, says that it is a felony not to keep the records in the ordinary handling of your business. It is clear. In reading the Spies case you don't need regulations.

I can give you regulations which say when you pay excise taxes and when you pay other taxes.

If we answer that question we know we are incriminating ourselves, but you are asking me to give you a regulation or something when the statute is so clear there has never been a regulation made because it is well known that when a man is in business and he doesn't keep records of his business he is guilty.

THE COURT: What is he guilty of?

MR. WITKIN: If——

THE COURT: Now. What is he guilty of now?

MR. WITKIN: If Your Honor please, I have to answer it with an "if", because I must argue hypothetically. The newspapers printed a story that I admitted saying. I have to say "if".

If he is in business, and he knows from January 1 to October 16, from January 1 to the present time he

has kept no records, he is guilty of a felony, if he didn't, under Section 145b.

THE COURT: Let me talk a minute.

[515] THE COURT: Now, let me talk to you a minute. You have talked. Now, you are the United States Attorney. I haven't kept any books and records now, of this year. What would you indict me for? Am I indictable? Am I subject to indictment?

MR. WITKIN: You are.

THE COURT: What can I be indicted for?

MR. WITKIN: You mean if I had the proof?

THE COURT: No, no, no, no. That is a simple question.

MR. WITKIN: I don't get the question.

THE COURT: I say to you now, I haven't kept books and records in my business for this year. Now, can you indict me? Have I done anything wrong, now?

MR. WITKIN: Certainly, you have.

THE COURT: What would you indict me for?

MR. WITKIN: Under Section 145 (b), I could indict you if I had the proof.

Now, what you are arguing about, may it please Your Honor, is, I won't get the proof until March. It doesn't make any difference. You are arguing, I won't get the proof tomorrow. But I've got it. You have gotten on the witness stand and you have said so. In other words, you have gotten on the witness stand, and you have said, "Mr. District Attorney, I, [516] now, ahead of the time, say to you I have violated Section 145 (b). What are you going to do about it?" Now, the minute I say I violated Section 145 (b), now, certainly, they are not going to find out until March of 1951, perhaps, but if I get up there and admit, or

if you make me get up there and admit it,—may I say that most respectfully?—then I have now told you that I have violated it. In other words, that's exactly what I am here for, is to prevent this witness from answering questions that he knows will tend to incriminate him.

Your Honor has got to literally blow out the Spies case, to use the common vernacular, and perhaps an improper one, and blow out Section 145 (b) completely. And then also I am frank to say to you that the Social Security Act provides for quarterly payments. If we admit that we are in business, and if we didn't make them, we are guilty there. The whole Tax Section provides for the withholding of taxes as they are due, not at the end of the year. In other words, if I have A, B and C working for me, and a witness is going to take the stand and make the statement——

THE COURT: Let's do that. Let's get on.

IRVING GREENBERG, having been duly sworn, was examined and testified as follows:

[517] DIRECT EXAMINATION.

By MR. WITKIN:

Q. Mr. Greenberg, you were before the Federal Grand Jury, were you not?

A. Yes, sir.

Q. And you refused to answer certain questions before the Federal Grand Jury, did you not?

A. Yes, sir.

Q. And you have a statement that I prepared with you and for you, as to your reasons why?

A. Yes, sir.

Q. Will you please tell His Honor why you have refused to answer certain questions.

A. Can I proceed?

Q. Yes, proceed.

A. If Your Honor pleases, the reason why I have refused to answer certain of the many questions put to me by Mr. Goldschein before the Grand Jury is because my answers to these questions will incriminate me in a violation of federal criminal statutes, among which would be the violation of the Internal Revenue laws, and particularly 26 U. S. C. A., Section 145 (a), (b) and (c), as well as 26 U. S. C. A., Section 1625 (a) and 26 U. S. C. A., Section 1626 (a), (b) and (c).

In my income tax returns for the year immediately [518] preceding 1950 I have stated a certain local business in which I was engaged. In addition thereto, I have listed other income under the heading of "Miscellaneous". Were I to answer with respect to those years immediately preceding 1950, that I was engaged in another business, I would tend to incriminate myself with respect to the statutes and the sections hereof that I have just mentioned. Were I to admit that I was in another business, lawful or unlawful, in these previous years, for which I have filed a return, I would be incriminating myself. Were I to admit that I was in another business that had a gross income from which there would have been deducted gross expenditures, including payment of employees, Your Honor, I would be incriminating myself. These incriminations would be with respect to these violations of the Federal Income Tax laws.

Now, may it please Your Honor, with reference to the year of 1950, it is true that I have not yet filed my return for that year, and need not until March of 1951. But, may it please Your Honor, if I were to answer those questions which I have to refused to answer, I will tend to incriminate myself of violations of the Federal Income Tax laws of the sections hereinabove referred to, and argued at length by my attorney on Friday last. May it please Your Honor, if I admitted that I had a business other than the

business that I have mentioned to the Grand Jury, if I admit that in that [519] business I had employees, then I know that my answer will tend to incriminate me in the violation of Sections 1625 (a), 1626 (a), (b) and (c), as well as Sections 145 (a), (b) and (c) above referred to. Were I to admit that I had no records and kept no account of my other business, lawful or unlawful, other than the business testified to, I would be incriminating myself in a violation of the Federal Income Tax laws. I know that if I admitted being in any other business, lawful or unlawful, and had employees in the operation of that business, and/or if I admitted that I did not withhold the tax due to the United States Government, I would be incriminating myself not only in violation of the income tax laws which I have enumerated above, but that I may tend to incriminate myself with regard to conspiracy charges in connection therewith. I also believe that answering the questions which I have refused to answer may tend to incriminate me in violation of the False Statements Statute of the Federal Criminal Code.

My fear and apprehension that I would tend to incriminate myself is based upon not only that which I have read in the newspapers but also upon the fact that Morton Witkin, Esq., of my counsel in whom I have great trust and confidence, has advised me that it is his honest and sincere opinion that were I to answer the questions referred to I would be incriminating myself. I believe that his advice is sound and I choose to [520] rely upon it. May I say in conclusion that these two reasons are in addition to and not exclusive of my own inherent belief of self-incrimination due to the fact that I have knowledge of what my answers to the refused questions would be.

Mr. Witkin: May it please Your Honor, I think that sums up exactly our position in this case, and I want to say very frankly that I think Your Honor was manifestly fair in stating to me that I could produce this witness without compelling him to be subject to any contempt proceed-

ings if he refused to answer the questions referred to. Now, Mr. Kossman tells me there is a case, the Hadfried case, in the Circuit Court of Appeals, where a man relied upon the advice of his accountant, a certified public accountant, as to certain matters, and the court held that relying upon that advice was sufficient.

THE COURT: What is the citation?

MR. KOSSMAN: I think it is 63 Fed. 2d. It is in the Third Circuit. The case is Hadfried v. Tax Court.

THE COURT: I haven't read that, and I want to read it.

But Greenberg doesn't now say that he has not kept any books.

MR. WITKIN: But, if Your Honor please, the minute [521] he does——

THE COURT: I understand that. I thought you told me he was going to testify that he had not kept any records.

MR. WITKIN: No, no.

THE COURT: I misunderstood you.

MR. WITKIN: Your Honor did, because I am frank to say to Your Honor, and Your Honor can take my word for it——

THE COURT: Then we go back to the original question. In other words, the situation is no different. He doesn't say that he has employees, he doesn't say that he didn't keep books.

MR. WITKIN: Certainly not. The minute he does——

THE COURT: Let me finish, and you can have a lot of time. He goes back to the same position that he took originally.

MR. WITKIN: Except that you have, up until now, had averments of counsel, arguments of counsel. Now, you have the witness himself, who tells you that he is in fear and apprehension—he tells you why—of that thing.

THE COURT: All he is doing is saying what you said. He hasn't in any wise shown any pushing of any door ajar. [522] He doesn't even come in and say, "I have not kept books and records."

MR. WITKIN: The minute he does, he might just as well —he would be in better shape—answer it before the Grand Jury that he was in a business, because at least then he wouldn't have been compelled to answer a direct violation. This is the strongest link in the world to a direct violation. If he answers those questions in the affirmative and makes an affirmative statement—Your Honor is absolutely right, and I think we understand each other clearly on that—the minute he does that, he has incriminated himself.

Because if I were to permit him to answer that he kept no records, or the minute I say I am in another business, the word "business"—we must carry our common sense into the court room—means "A business." Now, what is "A" business.

THE COURT: You come back to the same position of Mr. Gray's client. You are in the same position as to the Stromberg case.

MR. WITKIN: I didn't hear Mr. Gray's argument, but he is a much better lawyer than I ever hope to be, and if he says so, then I say so and agree with Mr. Gray, because he must be right.

But I say this to Your Honor, that the question [523] "Are you in a business?"—now, forgetting everything else, let's say for the sake of argument you are going to throw out all the statements I made about the Federal Income Tax law. I don't think you should, but suppose you did. What about the General Statute of False Statements? What about the fact that I filed an income tax return in which I said that I was in a certain business, and I stop? Now, when I said I was in a certain business and I stopped, it necessarily follows that I was in no other business. And

then it turns out that I am in another business. Now, definitely, if that is so, on 1949 and 1948, and so on and so forth, Mr. Goldschein agreed to that, because Mr. Goldschein, on page 194 of the original testimony—in other words, Mr. Goldschein practically admitted—I don't say he intended to admit it, perhaps, but in my judgment he did, from what I read to Your Honor. When the case came up on 1949 and 1948, Mr. Goldschein said, "All right." Mr. Goldschein said, "I will paraphrase it, I will change it." Because he recognized that if the man said he was in "A" business, and he turned out to be in "A" business and a business, that he was probably guilty and could be incriminating himself on the statute. So he said, "I will change it to 1950." Then he read to you, if Your Honor recalls, and referred to the past year. Well, when the past year included part of 1949, he changed it again, and said, "When I come to ask him the [524] question again, I will reparaphrase it."

So all we have to concern ourselves with, as far as the argument is concerned on 1950 is the 1950, because Mr. Goldschein, unless he has changed his mind, agrees with me that he couldn't answer questions about anything before January 1, 1950.

Now, when you come to 1950, you come to the very section of 145 (b), you come to the very wording of the Spies case, you come to the fact that a man can't undo what he has done. If I have committed a crime now, and I don't get caught for two years, unless it is a crime where the statute of limitations exonerates me, I am guilty. In other words, the mere fact that I don't get discovered in the commission of the crime today, except for a murder, but where I go out and receive stolen goods and I don't get caught, now certainly I can't be prosecuted. And that is exactly the situation that applies to this case. If he had kept no records, if he has kept no withholding tax——

THE COURT: But he doesn't say so.

MR. WITKIN: But he can be guilty of aiding and abetting the person——

THE COURT: Why must I make the assumption that he didn't?

MR. WITKIN: Because he says so.

[525] THE COURT: Oh, no, no. He has got to show the Court that, by pushing the door ajar, that he is in danger or in reasonable apprehension of danger.

MR. WITKIN: May I say this in conclusion? Because I am only rehashing and I am repetitious, and Your Honor has been most courteous.

I say this to you, and I say it with all the respect in the world. If Your Honor's philosophy as to this would prevail, the Fifth Article of the Constitution of Pennsylvania isn't worth the paper it was written on, because no man in the world could ever come into court and stand upon his right of self-incrimination, not to be self-incriminated, or on his Constitutional right not to be compelled to give evidence against himself, but because Your Honor would in effect be making a ruling that would shock the nation. Because in my judgment it would be saying that the Fifth Article means nothing. Because a man would have to say, "I have committed a crime," before a Judge, in order not to be compelled to admit it before a Grand Jury. In other words, he would simply have no right to refuse to give evidence against himself.

MR. KOSSMAN: May I say a word, Your Honor?

THE COURT: Yes.

MR. KOSSMAN: In the first place, I would like to point out to Your Honor that the door which you say Mr. [526] Greenberg has to push ajar is not the door of the penitentiary; the only door he has to open up is a door leading to Your Honor's heart and understanding. And once you have taken a little look, and you have seen something, that is sufficient.

THE COURT: I have seen nothing. I don't see where you can say that he has told us about his business. I thought he was going to testify that he didn't keep any books and records, and therefore, to answer that he is in another business——

MR. KOSSMAN: That would open up the door to the penitentiary.

This is the last time that I will argue any legal point before Your Honor in reference to relevancy in this court room.

THE COURT: I don't want you to go into arguing all over again. You have argued it twice.

MR. KOSSMAN: This is a recent case, 183 Fed. 2d, 865, so it is very recent. In that case, Estes v. Potter, reading from the opinion, it involved a contempt case, and the usual reversal you always find in Circuit Courts. It said, referring to the court below, and mentioning that it had been frivolous as to appellant's claim of immunity from giving testimony against himself, "If one were asked whether he knew the general reputation of a horse thief, he could not say, 'I [527] won't tell that because it might incriminate me; I might, myself, be a horse thief.', there is no real logic in that position.

"Addressing the defendants, the court again said, 'If and when this court's judgment with reference to answering these questions is upheld, then that will continue to be the order, and you are liable to spend a long time in jail when you ought to be a free man, and all in the world you have to do to be a free man is simply to answer, 'Do you know these aliens? Are they Communists? Do you know this man here? Is he a horse thief?' Do you see the point? Do you see this man here? Is he a preacher? Is he lawyer? You can see how simple it is. There is nothing to it. So I find you in contempt and sentence you to pay a fine of $100 and remain in jail for thirty days unless you purge yourself.' "

"We can not" (this is the Circuit Court speaking now). "We can not agree that the matter is so simple. The answers to these questions in themselves may not even tend towards incrimination of appellant, but they may be links in a chain of circumstantial evidence strong enough to convict him of a number of crimes, or such answers might well provide the means whereby such evidence could be discovered."

Now, skipping to save time, "The questions propounded to appellant do not disclose the incriminatory nature of the answers sought to be elicited, but appellant doesn't [528] have to prove that his answers would incriminate him, to be entitled to his privilege. If that were the nature of the burden, he would be forced to divulge the very facts that the immunity permits him to suppress. A witness need only show that his answers might be dangerous to him."

Well, so much for that. Perhaps it is repetitious.

Now, there is a case, namely, Hobson v. District Court. In that case, involving contempt proceedings, the man was asked specifically, "In what business is your son Leo Hobson now engaged? State to the Grand Jury where your son Leo is at the present time, and anything you know about his present whereabout."

Here is what the Court said. The lower court, the District Court, committed him for contempt, but it came up to the Supreme Court of Iowa. Here is what they said.

THE COURT: What is that citation?

MR. KOSSMAN: That is in Northwest 40. I see the girl left out the number, but I will supply that to you later. The case is Hobson v. District Court, and it is the Supreme Court, Iowa, and I believe it was 137. But I will get the exact quotation.

Here is what the Court said. It is the exact question involved. "If, for example, the answer of the witness [529]

to the first question had been that he was engaged in a dry goods business, or in the second, that his son, Leo Hobson, was residing in Kalamazoo, it is hardly conceivable that such evidence would have been material. Before ordering the witness committed to jail for contempt, the court should have required the Grand Jury to make sufficient showing to enable it to say that the questions were proper and that they sought to elicit material needed for important information."

In other words, you are talking about going forward. This case, in the Supreme Court of Iowa—and I will show the fact that, being a state case doesn't mean it can't be quoted in a federal case, because in the determination of the case of Hale v. Henkel, the Supreme Court, in discussing powers of a Grand Jury, bases the decision upon an analysis of all the cases in the state courts. In fact, they specifically said there, "While no cases are listed in the Supreme Court in this case, there have been distinctly presented the authorities in the state courts, which largely preponderate on the theory that the Grand Jury may act upon information."

Now, Mr. Goldschein, Mr. Witkin, Mr. Gray, Your Honor, and I have been unable up until now to find a case; therefore, it would come under the doctrine of Hale v. Henkel, and I can give you a state case on the exact point, and you have to accept it in lieu of anything better, if you agree with [530] the reasoning.

The rest would be mere repetition. If the Court please, I don't want to talk too much, but may I have one more second on this? I think there is a great misunderstanding in the word "witness." If you look up the word in the dictionary, you will find that it is a witness to a different transaction. When, in the Camarata case, they asked him, "Did you sell wire service to a third person; did you do this, in terms of a third person," that is perfectly all right. The law doesn't say you can claim self-incrimination about

testifying to a transaction involving a third person. But when they asked Mr. Greenberg about questions concerning himself, then, in its literal language, he doesn't have to be a witness against himself in a criminal case, and, this being a matter before a Grand Jury, it is a criminal case. It is quite different from the case that Mr. Goldschein has cited.

Another thing, the Rogers case, for whatever it is worth to Your Honor—there is a certiorari pending in the United States Supreme Court. So whatever the law would be, in terms of deciding the case against the defendants in that case—there are four judges, at least, in the United States Supreme Court that think a little differently than the majority of the Circuit Court.

• • •

[532] Now, the other question, "Do you know anybody in the numbers business" is so vague and so general that if he names one person—that couldn't involve an obstruction of justice.

Does Your Honor want to listen now to the theory of obstruction of justice or later on—because the mere fact that he doesn't answer questions doesn't mean contempt of court, there has to be an obstruction of justice.

In all those cases involving perjury where a man has deliberately lied——

THE COURT: I went into that in a lot of detail.

MR. KOSSMAN: I know.

MR. WITKIN: There are two things that I would like to call Your Honor's attention to.

One thing, I take it Your Honor is familiar with the fact that there are certain of these additional questions that are innocuous that we are willing to answer.

THE COURT: I thought you two were to get together and straighten those out.

MR. WITKIN: I think Mr. Goldschein said that he admitted some questions, but there are two questions: "Do you pay for the straight line"—page 2162. I say that we are willing to answer that question. The answer would be no. And the other question: "Do you use a telephone?" Well, he has [533] already answered that, Mr. Goldschein admits in the subsequent questions.

I think that is the only one that we have agreed to answer.

For instance: "Do you make regular calls from that telephone?" he refused to answer, but later apparently from other testimony he did answer it.

THE COURT: Why don't you give to Mr. Goldschein the questions which he will answer, just reading them off here —give them to him.

MR. WITKIN: It is just the one, the others he has answered, and I think Mr. Goldschein agrees that he has answered them.

MR. GOLDSCHEIN: The record shows I have given the Court and counsel both a copy of what questions he has and has not answered.

MR. WITKIN: It is very clear, there is no use arguing about that. For example, here is a question that Mr. Goldschein says he didn't answer: "Do you use a telephone in Perry's tailor shop?

"I refuse to answer that question because if I do, it will incriminate me."

"Using the telephone may incriminate you?"

"Yes, sir."

[534] Later, right on down here, page 2170: "Now, you said that you used that telephone at Perry's place regularly, is that right?"

"Yes, sir."

"Do you use it for business—I am talking about when you say now since the first of the year."

"Yes, sir."

In other words, the answer to the question before where he refused to answer is now answered in 2170. So I think we ought to clarify that. Then there is just one other.

MR. GOLDSCHEIN: I don't think we need go into that matter. If the Court makes a rule in the finale that there is an incrimination, he must not answer, that ends it. If the Court rules that there is no incrimination and he must answer, then those questions that he wants to answer he will come back before the Grand Jury and answer. I don't think that is a stumbling block.

MR. WITKIN: One other statement, if Your Honor please. I would like in the category of a witness to make a statement, and if Your Honor wants to swear me I would like to be sworn.

THE COURT: We won't swear you, but I think if you want to make a statement Mr. Goldschein would probably like [535] to cross-examine you.

MR. WITKIN: He has a perfect right to.

THE COURT: Do you want to take the stand?

MR. WITKIN: Yes, I will be glad to.

THE COURT: You don't want Mr. Witkin to be sworn, as a member of the bar?

MR. GOLDSCHEIN: For the record it will be necessary, if he is testifying in this case he would have to be sworn as a witness. I don't know of any way of waiving that.

MR. WITKIN: I am perfectly willing to.

MR. GOLDSCHEIN: I am willing to, if that is the practice. I don't know the practice. If that is the practice, we will waive it.

THE COURT: That has been the practice.

MORTON WITKIN was examined and testified as follows:

THE WITNESS: May it please Your Honor, Mr. Greenberg has read——

MR. GOLDSCHEIN: Before you go on, we are not through with this other witness.

THE COURT: You have a right to cross-examine [536] him.

THE WITNESS: May it please Your Honor, Mr. Greenberg in reading his statement read as follows, inter alia, "But also upon the fact that Morton Witkin, Esquire, of my counsel in whom I have great trust and confidence, has advised me that it is his honest and sincere opinion that were I to answer the questions referred to I would be incriminating myself."

May it please Your Honor, merely for the purposes of the record, I have been at the bar I think thirty-one years; I say to Your Honor that I have discussed this matter with Mr. Greenberg most carefully and thoroughly; I have taken into consideration the responsibility that rests upon my shoulders in giving Mr. Greenberg advice; I have taken into careful consideration the seriousness of the Grand Jury proceedings; I have taken all those things into consideration.

It is my honest, sincere and legal opinion that were Mr. Greenberg to answer the questions which were propounded to him that he would be incriminating himself.

That answer is based upon the information which Mr. Greenberg has given to me, and it was also based upon my knowledge of the law and my opinion. And I say that I have done so with a great sense of my responsibility both to the Court as well as to the client.

* * *

[544] MR. GRAY: If the Court pleases, first of all I have noticed this on other occasions, but this one particularly

with reference to my client, that for some reason unknown to me Mr. Goldschein has always had the Grand Jury present when these arguments take place. It doesn't seem to me to be proper when these are purely legal arguments that they should be had in the presence of the Grand Jury.

MR. GOLDSCHEIN: Is this with reference to the Grand Jury being present?

MR. GRAY: Yes.

MR. GOLDSCHEIN: May it please the Court, the Grand Jury asked of me whether it was proper for them to be present, if they could be present in court when these arguments took place, that they wanted to hear them. I told them that there was nothing improper about it, and I saw no reason for their not being here if they wanted to be here to hear the arguments.

THE COURT: I don't know. I would rather not have the Grand Jury present at these hearings. On presentments it is a different matter. Here counsel advert to matters—both counsel, yourself for the Government and counsel for the defendants—and it might well be that a lot of what they say is not—when I say this it is with deference to both counsel—it may not be a matter which is directly pertinent to the issue before the Grand Jury.

[545] MR. GRAY: Take this morning, I was present and heard that. If I had been here representing parties that were here this morning, they heard a great many things that they would have had no right to hear.

MR. GOLDSCHEIN: I was basing it on the fact that the Grand Jury may of their own motion subpoena people on the outside to come back and report to the Grand Jury.

THE COURT: That is a different matter. Here is a matter which is not in the room on which they have heard evidence and the legality of it is being discussed and adversions made to various phases of it which may or may not be relevant in the Grand Jury proceedings.

I didn't know. As a matter of fact, I looked around. I think the Grand Jury ought not to be here to hear these arguments. I am going to ask the members of the Grand Jury to withdraw, if they will, please, during these arguments.

All right, Mr. Gray.

MR. GRAY: We have, if Your Honor pleases, an undecided question before the Court. I don't want to go back and read to Your Honor my discussion and my argument last week, but I can if there is any particular point that arises in your mind and I am questioned about it, but I asked Your Honor to let me have the rest of the testimony of Mr. Stromberg before this jury in order that I might be aided . . .

• • •

OCTOBER 30, 1950.

[628] THE COURT: I am getting to that.

These repeated refusals to answer concern itself with the basic question "Are you in the numbers business?" I think that the continued getting around it in various or different variations with respect to it, since counsel have chosen to make their stand, I think they ought to go up on the question "Are you in the numbers business?" I don't understand the Government's position. Is it that you think eventually you are going to get the answer, Mr. Goldschein?

MR. GOLDSCHEIN: Yes.

THE COURT: Don't you think we would be better off to get a ruling from the Circuit Court as to that main question rather than side issues? I don't mean by that in anywise to say that it isn't pertinent and necessary, but aren't we just getting around, if he refuses to answer that he is in the numbers business, you have the unlawful business specifically decided, and the Court will decide. Why don't

you go up on the main issue as to whether or not he is in the numbers business?

MR. GOLDSCHEIN: It is simply this. At first he refused to answer quite a string of questions. The Court compelled him to answer. Of course we can't anticipate which questions he will or which questions he won't.

THE COURT: That is right.

MR. GOLDSCHEIN: When he gives an answer that. . . .

• • •

[632] . . . attention specifically to the fact that we object to answering the questions on the ground of the fact that they are irrelevant, and I quote none other than Mr. Goldschein. He says he is not asking these questions because they involve a violation of a federal statute.

MR. GOLDSCHEIN: I didn't say that.

MR. KOSSMAN: You said, "Not pertinent to the violation of a Federal statute."

THE COURT: I have ruled on the question of relevancy. I have disposed of the relevancy issue. I will rule on that now. I don't think this witness has any ground to question the relevancy before a Grand Jury proceeding. I will put it as broadly as that.

MR. KOSSMAN: Is that Your Honor's ruling?

THE COURT: It has been my ruling for ten days, now.

MR. KOSSMAN: I will have an exception to that.

THE COURT: Yes.

I am going to rule here, that these questions have to be answered, and the witness can go on if he wishes tomorrow morning at ten o'clock.

MR. GOLDSCHEIN: The Grand Jury is waiting.

THE COURT: It is twenty minutes of six. I didn't know you worked that late.

• • •

[635] . . . is Point No. 1 that I would like to have a ruling on.

THE COURT: The Supreme Court has that petition under advisement?

MR. KOSSMAN: Certainly.

THE COURT: In that other case?

MR. KOSSMAN: Yes. And the thought is when there is a similar issue pending, that the Supreme Court would automatically take cognizance of it, because it is the same problem.

THE COURT: Well, now, wait a minute. If you want to set that down, I am here. We will set it down. I understand from what was intimated to me by Mr. Goldschein, he wants to take the stand and—or, is the motion to quash? No, that was in the Palermo case, wasn't it?

MR. GOLDSCHEIN: There is a motion to quash the subpena duces tecum, and the Court took that under advisement pending a showing by the defense, whether or not you will quash that subpena duces tecum, or have me produce for the Court——

THE COURT: Yes. Aren't you going to offer some——

MR. KOSSMAN: If the Court please, the motion on the subpena duces tecum—it is very important I get this straight—I am directly asking Mr. Goldschein to bring his [636] file. Now, he has filed a motion to quash. Now, if the Court pleases, I suggest that the issue in that particular motion—and the defendant is not trying to get the Court to do anything but simply decide that particular motion before the contempt proceeding—you thought it was premature, but now we are one day before, let us say, the contempt proceeding, or two. So it is not too premature.

Now, this Court has to make a ruling, and I would like to put the Court on notice, with all the deep respect I have for the Court, that if this Court denies the motion, that is,

my motion, that I will file a writ of prohibition in the Circuit Court or the United States Supreme Court, calling attention to the fact that the same issue is now pending before them. That is why I brought the certiorari. Aside from the fact that all the lawyers, when the Government institutes a criminal proceeding, they must divulge the evidence that they have—they are just the same as an ordinary litigant. That is Point No. 1, on which I will await Your Honor's ruling.

Now, Point No. 2, I now formally ask leave to examine the entire defendant's testimony before the Grand Jury in order to ascertain that the questions may be incriminating in context, and also all questions that have been asked of [637] other witnesses about Mr. Greenberg. Now, there is no question what the law is, and I am going to read it to Your Honor in one moment.

"In dealing with the presenting for contempt, the Court had before it only the question which the defendant declined to answer, and it expressly held that no other part of the testimony before the Grand Jury was relevant." That, of course, was the lower court. "The defendant's counsel asked leave to examine his testimony before the Grand jury. Counsel also asked the Court to examine the minutes to see whether the answers to the questions asked would not tend to incriminate the defendant, but the Judge declined to do so. The Government objected to all these sources of proof and was sustained by the Court."

Here is what the Circuit Court said:

MR. GOLDSCHEIN: What case are you reading from?

MR. KOSSMAN: United States v. Zwillman, 108 Fed. 2nd, 802. I guess the Judge made a wrong decision there, Mr. Goldschein.

MR. GOLDSCHEIN: No, he made a good one, but he had different from what you have. It is on the Touhy case.

MR. KOSSMAN: You want to read it. It may be a great help to you.

• • •

OCTOBER 31, 1950.

[652] THE COURT: Now, there probably was some misunderstanding. I thought I was obliging Senator Witkin when I said that I would rule on this tomorrow. I haven't any hesitancy in ruling on this—I want this in writing. There are two motions here. One is for the production of the books and records in connection with the records concerned with the investigation of Irving Greenberg under a subpoena duces tecum. That is your first motion, isn't it?

MR. KOSSMAN: If the Court please——

THE COURT: Look, we don't want—I am going to rule here. There is going to be no delay here. I want to hear no argument on it, not one bit of argument.

MR. KOSSMAN: I am not going to argue it.

THE COURT: I won't hear any more.

MR. KOSSMAN: On October 18 a motion to quash a subpoena duces tecum was filed. On October 18 you took the motion under advisement. That is a matter of record. You haven't as yet rendered a decision. That is a matter of record.

Now, I am now stating to Your Honor I am filing a motion for the production of the documentary evidence, which amounts to practically a renewal of my motion, and I put this in writing.

THE COURT: I have it here. Isn't that the same one?

[653] MR. KOSSMAN: That is correct.

THE COURT: All right.

MR. KOSSMAN: Now, a brief has been filed on October——

THE COURT: That is right. It has been argued.

MR. KOSSMAN: There are certain things that I just want to bring to Your Honor's attention.

THE COURT: Make it brief.

MR. KOSSMAN: Now, as Your Honor knows, the United States v. Regan case is now pending in the United States Supreme Court.

THE COURT: Yes, I know all about that.

MR. KOSSMAN: Then I don't have to discuss the law of the case.

THE COURT: All right. Now, I say to you with respect to that motion for the production of the documentary evidence, on the record as it now is it will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate.

MR. KOSSMAN: Your Honor——

THE COURT: Now let me finish. You will put this man on the stand, Greenberg, if you want to, if you see fit. I am not going to give his books and records—I take it they are here available.

[654] MR. GOLDSCHEIN: Yes, sir, they are available.

THE COURT: They are here available for this Court first to inspect. I say to you that you will not have any opportunity to look at that record. We will not divulge Grand Jury proceedings to you or to any other counsel or anybody else. When and as you make some showing that this defendant, that this witness is in reasonable danger of incriminating himself to the satisfaction of this Court, I will then decide whether or not this is the fact, or if there is some showing that he reasonably might be put in danger, then I will decide whether or not they may be inspected, but until that showing has been made, you will not see any Grand Jury proceedings. I may or may not be wrong, but we will have that ruling.

MR. KOSSMAN: May I say a word to Your Honor? Your Honor, I respectfully say, is confused on what I have asked for in the subpoena. I didn't ask in the subpoena

about the minutes of the Grand Jury. You are talking of the minutes of the Grand Jury.

THE COURT: Just a minute. You want all the records concerned with the investigation.

MR. KOSSMAN: The investigation.

THE COURT: All right.

MR. KOSSMAN: That is the file of the Department [655] of Justice.

THE COURT: Have you that here? All the records are available, Mr. Goldschein?

MR. GOLDSCHEIN: Sir?

THE COURT: Have you all the records?

MR. GOLDSCHEIN: Yes, sir.

THE COURT: We are getting technical now, concerned with the investigation of Irving Greenberg, in connection with the examination of Irving Greenberg as a witness before the Grand Jury in connection with the examination and questioning of other witnesses who have appeared before the Grand Jury and have testified about Irving Greenberg? They are here available for the Court?

MR. GOLDSCHEIN: Yes.

MR. KOSSMAN: I might say, Your Honor, that Mr. Goldschein said he will not produce them on October 18. That is a matter of record.

THE COURT: He has them here now.

MR. GOLDSCHEIN: Yes, sir.

THE COURT: Until you make some showing you will not see those records. You might as well satisfy yourself about that. I can be wrong.

MR. KOSSMAN: If the Court pleases, I can be wrong, too.

[656] THE COURT: Mr. Kossman, Mr. Goldschein is anxious to get to the Grand Jury, very anxious.

MR. KOSSMAN: This will take——

THE COURT: I don't want him held up any longer.

MR. KOSSMAN: May I have an exception to your ruling, Your Honor?

THE COURT: You have that exception.

MR. KOSSMAN: I want to remind Your Honor that under the Sixth Amendment we are entitled to compulsory process. I am stating that it is most important. That is in terms of the investigation.

THE COURT: That has been ruled on. You can argue that to the Circuit Court.

MR. KOSSMAN: There is a second motion in the same thing.

THE COURT: I am coming to that.

MR. KOSSMAN: For the Grand Jury minutes.

THE COURT: All right.

MR. KOSSMAN: I want Your Honor——

THE COURT: Just a minute. Are you through taking this exception you want to the first ruling?

MR. KOSSMAN: Yes.

THE COURT: The next one is "Irving Greenberg by [657] his counsel again requests the Court to allow him the minutes of the Grand Jury to show the questions asked of Irving Greenberg would tend to incriminate him."

I deny that motion.

MR. KOSSMAN: May I have an exception?

THE COURT: All right.

MR. KOSSMAN: I say to Your Honor the United States v. Zwillman——

THE COURT: Yes, I have gone all through it.

MR. KOSSMAN: Now I am going to make two oral motions, Your Honor.

THE COURT: I want them in writing.

MR. KOSSMAN: Yes, I will file them in writing immediately.

THE COURT: All right.

MR. KOSSMAN: They will be filed today. Here is the motion that I am making.

THE COURT: All right. I want it filed in writing.

MR. KOSSMAN: Under the Federal Rules of Procedure I have a right in an argument to make a motion orally and then submit it in writing.

THE COURT: You are quite right.

MR. KOSSMAN: I therefore request permission to [658] make an oral motion. My first motion is to discharge Irving Greenberg as a witness before the Grand Jury for the following reason, that contrary to law and to the prejudice of Irving Greenberg, the Grand Jury with the consent of Special Assistant Attorney General Max H. Goldschein was present during the legal and factual argument presented on behalf of Irving Greenberg by his counsel and by Irving Greenberg. Neither counsel for the defendant nor Irving Greenberg nor the Court were aware of the presence of the Grand Jury until the legal and factual argument had been presented to the Court. The Grand Jury also listened to the Court's comments and rulings on the procedure presented on the legal and factual argument on behalf of Irving Greenberg. The Grand Jury also listened to the legal and factual argument and comments of Special Assistant Attorney General Max H. Goldschein. Furthermore diverse other persons were present with the Grand Jury at the same time. I am prepared to argue the law immediately.

THE COURT: No, you don't need to argue the law.

MR. KOSSMAN: That is the motion.

THE COURT: I deny the motion now. You can present it formally. I will enter a formal order. I will deny the motion now.

[659] MR. KOSSMAN: My next motion, if Your Honor please, is based on the same propositions to discharge Greenberg as a witness before the Grand Jury because Special Assistant Max H. Goldschein disclosed and made public the questions that were asked of Irving Greenberg, and his answers, contrary to the law, and to the prejudice of Irving Greenberg.

THE COURT: I deny that motion.

MR. KOSSMAN: I will have an exception to that.

MR. GOLDSCHEIN: May it please the Court, I think Mr. Kossman should be compelled to specify that, just what was made public and where.

MR. KOSSMAN: Well——

THE COURT: I don't know that that would have any bearing on the Court's ruling, but if you want it for your own benefit it ought to be said. When was it, Mr. Kossman?

MR. KOSSMAN: I am reading from the paper, the Philadelphia Inquirer, Wednesday morning, October 25, 1950, shortly afterwards Goldschein made public the text of the questions the two witnesses have refused thus far to answer; first it was with Mr. Rosen, with which I am not interested, and the second of course was with Mr. Greenberg. Goldschein said, and they quote the list of questions.

MR. GOLDSCHEIN: Of course, that was in the court room here.

[660] MR. KOSSMAN: That is all right, but you look at the Rules of Federal Procedure from Rule 6 (c).

MR. GOLDSCHEIN: That was with the permission of the Court.

MR. KOSSMAN: Was it?

MR. GOLDSCHEIN: I want to call the Court's attention to the original statement of Mr. Kossman and the implication that he was attempting to leave with the Court, that I made public outside of this court room statements or testimony before the Grand Jury, and when it comes down to the finale it is matters that I called the Court's attention to that occurred before the Grand Jury with the permission of the Court.

THE COURT: Anything further, Mr. Kossman?

MR. KOSSMAN: Yes, if Your Honor please. Have you ruled on that?

THE COURT: Yes, indeed, I have.

MR. KOSSMAN: The usual exception.

The next motion that I make is that contrary to the law and the prejudice of the defendant, the Special Assistant Attorney General has questioned other witnesses appearing before the same Grand Jury before whom Irving Greenberg appeared as a witness, about Irving Greenberg, and that Mr. Irving Greenberg is therefore being made the subject [661] of an investigation although he is called to witness. This is contrary to law and to the prejudice of the witness.

THE COURT: What is your motion?

MR. KOSSMAN: The motion to discharge Mr. Greenberg as a witness before the Grand Jury.

THE COURT: It is denied.

MR. KOSSMAN: And the other motions I have already made.

My next and final motion is this: It is based on the proposition that the United States v. Regan case is now

pending in the United States Supreme Court. Under the law the United States Supreme Court, under law of, it seems to me, that governs any District Court, that where a similar proposition is pending in the United States Supreme Court, certiorari has been granted, that cases are continued until that question has been decided. As a matter of fact in the United States Supreme Court when you file a petition for certiorari and it involves the same similar question automatically grants certiorari and delays deciding the second or the third or the fortieth petition—sometimes there are thirty people in the same case—until they have made the decision on the first case.

THE COURT: You put that in writing and present it and I will rule on it. That may require some more consideration. Put in in writing and present it and I will dispose of [662] it this morning.

MR. KOSSMAN: I also want the Court to feel, in view of the fact that Mr. Goldschein seemed to be excited—and I want to state it of record that I have the greatest and highest regard for his zealousness as a prosecutor, there is no greater public servant in the country.

THE COURT: That is very fine; with becoming modesty I am sure he appreciates it.

MR. KOSSMAN: But my argument and all my difficulty with him, and sometimes with the Court, is that I have a Constitutional mind in the sense that I think that certain procedures that have been going on are unconstitutional, and I'd rather not practice law than not have an opportunity to present it the way I feel.

THE COURT: Aren't you getting every opportunity?

MR. KOSSMAN: I have.

THE COURT: Is there anything else? Have you something, Mr. Goldschein?

MR. GOLDSCHEIN: No, sir.

THE COURT: We will recess until ten o'clock tomorrow morning.

(Recess at 10:45 A. M.)

* * *

NOVEMBER 1, 1950.

[664] (The Grand Jury came into the court room.)

THE COURT: Mr. Goldschein——

MR. GOLDSCHEIN: May it please the Court, the Grand Jury are assembled in court and have a presentment to return to the Court.

THE FOREMAN OF THE GRAND JURY: If the Court please, we have this presentment from the Grand Jury to present to the Court.

(The Court examined the presentment of the Grand Jury.)

THE COURT: All right, Senator Witkin. The Attorney General—have you given him a copy?

MR. GOLDSCHEIN: No, sir.

THE COURT: Hand to Senator Witkin the presentment directing Irving Greenberg for criminal contempt.

MR. GOLDSCHEIN: The Court asked whether we were proceeding by oral presentment and the respondents suggest that they would rather have a written presentment. There is no new——

MR. WITKIN: I don't remember ever saying that.

MR. GOLDSCHEIN: I have it right here in court, and I told the Court we were going on with a written presentment, if there was one. There is no new matter in this presentment. The questions there are as ordered by the Court.

[665] MR. KOSSMAN: Is this the presentment?

MR. GOLDSCHEIN: Yes.

MR. KOSSMAN: In the first place, I am now filing a motion to dismiss the presentment. That is number one.

Now, under the rules, if the Court please, Rule 12, (4), "a motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress."

THE COURT: What general issue?

MR. KOSSMAN: Well, the man is charged with a crime, a criminal contempt, and the criminal contempt is a crime which he will have to plead to, and of course he will plead not guilty. Now, under the law we have a right to determine the facts averred in that motion before or during the trial.

THE COURT: Bring him before the bar of the Court and ask him the question.

MR. KOSSMAN: I beg your pardon, if Your Honor pleases. This is a criminal trial and I am now filing a motion to dismiss the presentment. Certain facts averred in there——

[666] THE COURT: Have you a copy of this?

MR. GOLDSCHEIN: May I see the motion?

MR. KOSSMAN: I will be glad to.

MR. WITKIN: This is not even a correct transcript, Mr. Kossman. Part of the answer is missing.

MR. KOSSMAN: We haven't had——

MR. WITKIN: If Your Honor please, may I interrupt a moment? As I read this hurriedly, this is not a correct transcript of the testimony given by Mr. Greenberg, as I understand it, because as Mr. Goldschein read yesterday and as I read this hurriedly—I just glanced through as Your Honor did—part of the answer that Mr. Greenberg

gave asked to have incorporated at length a statement made before Your Honor, Judge Ganey, and I note that in this presentment none of that appears. I know that after he once made the statement it was agreed that he would just refer to it without rereading it again, but on the first answer when he appeared before the Grand Jury on Monday part of his answer was this statement that he made before you, and he started to read it. As he started to read it Mr. Goldschein told him he didn't have to read it in its entirety, that they would make it a part of the record. I don't see it here at all, even though he did answer the question. Before we go on to the question of further disposing of Mr. Kossman's motion, I would like to have a word [667] to say as to when I think this case ought to be tried, but I won't do that until Mr. Kossman finishes his motion, but I do direct Your Honor's attention now that I would like to examine this transcript to find out whether it is accurate. I am quite sure it is inaccurate by a quick glance, because I do note that the first question here that Mr. Greenberg was asked on Monday, when he answered it he answered it and read this statement to the Grand Jury.

MR. KOSSMAN: Your Honor——

THE COURT: I can only hear one at a time. I am going to ask you—I want to listen carefully to Senator Witkin, and I don't want you to interrupt.

MR. KOSSMAN: I don't want the Grand Jury to be present during this argument.

THE COURT: Please be quiet until co-counsel is finished. Have you finished, Senator Witkin?

MR. WITKIN: I have finished on that one question. In other words, I haven't had a chance to read this carefully, but I am quite sure it is inaccurate, and I would like to have the opportunity to show it is inaccurate.

THE COURT: What about it, Mr. Goldschein? I think there was something said. I don't know whether it occurs here. I am certain——

MR. GOLDSCHEIN: This presentment recites [668] generally what occurred, but charges that he refuses to answer, I think it is five questions that are underscored here. That is the gravamen of the charge here, and the sole question before the Court is whether or not he answered the questions that the Court ordered him to answer. That is the sole question in this presentment.

THE COURT: Senator Witkin has said that there was—that he read a statement. I don't know that that is particularly material. He claimed his Constitutional privilege, and I don't know that that is——

MR. GOLDSCHEIN: That has been raised in court here. It has been raised in court.

MR. WITKIN: Here is what they do, may it please the Court. For example, he is asked a question, "Are you in the numbers business now?"

Now, the Grand Jury presentment apparently quotes the answer, and the answer is quoted. It doesn't quote it in part. It quotes it in full, presumably. Now, the answer is, "Did you during the past year operate the number business"?

THE COURT: That is another question.

MR. WITKIN: Then the answer he has got, "I refuse to answer this question because it incriminates me and I stand on my Constitutional rights."

[669] As I understand the answer as Mr. Goldschein read it yesterday to you, and I read from the paper, "I refuse to answer this question for the reason that my answer would tend to incriminate me, and I stand on my Constitutional rights, and in further answer to this question I desire to incorporate into the record as part of my answer a statement which I have made before the Honorable Judge J. Cullen Ganey in connection with this question," and the witness then read the statement to the Grand Jury, and when he was half finished reading it Mr. Goldschein said

to the witness, "You don't have to read it all. We will have the stenographer take it down."

Now, Mr. Goldschein read it to you yesterday.

Now, in the answers that appear here, if this is supposed to be a correct transcript of what the witness answered, then I respectfully suggest to the Court that we either ought to be told in this paper that it is only part of the answer with little jiggers put in to show that they are just taking from the complete text, or we ought to have the complete answer to the question. In other words, this is the presentment that is given that we are going to trial on. It ought to be a correct presentment and it should contain a complete answer, and we ought not to have parts of his answer deleted.

MR. GOLDSCHEIN: May it please the Court, [670] there are on page 4, after number 8 is the question, "What is your answer?" And I assume that is what Mr. Witkin is talking about, "Answer: I refuse to answer this question because it will incriminate me and I stand on my Constitutional rights," and after that there are some asterisks and his quotation. Now, we aren't quoting the whole transcript. Asterisks are placed to indicate that there is something else that was given that wasn't included.

What he said before the Court is not material to the issue on whether or not he did or did not answer the question as ordered by the Court.

MR. WITKIN: You are reading from the wrong place, Mr. Goldschein. You see, Mr. Goldschein——

MR. GOLDSCHEIN: Number 11, is that where you are reading?

THE COURT: Let me have something. Here you have the question on page 3, "Are you in the numbers business now?" and you have no answer following. Why is that?

You go on and ask another question, "Did you during the past year operate a bookmaking establishment?"

MR. WITKIN: That is exactly—excuse me, Mr. Goldschein.

THE COURT: Just a minute. Isn't there an answer to "Are you in the numbers business now?"

[671] MR. GOLDSCHEIN: Here is the answer to that, may it please the Court.

THE COURT: Where?

MR. GOLDSCHEIN: Right above that, the first sentence above it.

THE COURT: There is no first sentence above it in my record, page 3 is the first page.

MR. GOLDSCHEIN: I can explain that, if the Court will permit me. Right above the first question the first sentence above that reads, "The Court after hearing argument of counsel for the witness and for the Government again found that there was no real and substantial danger of incrimination to the said witness, Irving Greenberg, and ordered him to return before the Grand Jury and answer the said questions which he had refused to answer, namely—" these are the questions he refused to answer.

Now, this is a presentment and we are not offering all the proof in the presentment.

MR. WITKIN: Have you finished, Mr. Goldschein?

That is exactly the question that Your Honor just read to which the answer was made that I just read to you, and that was exactly the place where the witness made the statement.

THE COURT: I am not concerned about that statement in the slightest because I know it, I know what it [672] was. He claims his Constitutional privilege.

MR. WITKIN: Except that I think it ought to be in the record.

THE COURT: No.

MR. WITKIN: Here is the question and as you pointed out there is no answer. If we are faced with an indictment and presentment in the nature of an indictment we are entitled to the correct facts of the case.

Here is question one. We have an answer to question one.

Now, if this case were subsequently to be argued, if it ever became necessary, the answer that we made to question one isn't even here. It doesn't say why we refused when we went back.

THE COURT: You say on page 4 you don't adopt the same procedure there as you did on page 1. What is your answer —in the middle of the page—and there you give the answer, you give what he said. He said, "I refuse to answer because this will incriminate me and I stand on my Constitutional rights." Wasn't there some such answer to question one as you posed it?

MR. GOLDSCHEIN: Yes. May it please the Court, all the questions here were raised in open court here and the Constitutional privilege against self-incrimination was raised, [673] and Your Honor ruled on it and is part of the record in this case.

THE COURT: Had you any reason, my question is, for putting the answer in in one place and not in another?

MR. GOLDSCHEIN: No, except where it is explanatory and runs on. Here are some questions that you can't put, like the question "Who?" The question "Who?" by itself means nothing, and if I was to just put that question there without any explanation they would come in here and say, "Well, what do they mean by 'Who', what kind of a question is 'Who'"? And in order that "Who" might mean something in the record we put all the questions that came before that he did answer.

Now, we are not predicating any contempt on what he did answer, but it is necessary to show those questions in

order that the question "Who" that he refused to answer would be plain.

MR. WITKIN: On page 5, for example, again Mr. Goldschein doesn't put the complete answer, and it appears that he has put the complete answer. It certainly seems to me that we have a right to attack the correctness of the questions and answers as propounded in this presentment, otherwise it could be referred to as an indictment.

For example, on page 5 at the top he doesn't put [674] any asterisks to indicate that he has taken from the complete text, but he gives the answer. That is not the complete answer.

THE COURT: Where, what portion of page 5?

MR. WITKIN: Right at the top, "I refuse to answer the question because my answer will incriminate me; I stand on my Constitutional rights."

Now, Your Honor may think that it is unimportant that his complete answer not being there may make no difference. That may be so for the sake of argument, but we have the right to make the presentment show that it is not the complete answer. All right, if he wants to delete part of it that is his business.

THE COURT: Is there a further portion to that answer? It doesn't indicate because there is no——

MR. WITKIN: There is. May I respectfully say to Your Honor he referred to the fact that he made a statement before you. Whether that is important or not is another matter to be determined. But what I want is a record that is correct as to what took place before the Grand Jury before we start any proceedings or any motions on the record; and I certainly ought to be given the opportunity of going over it. I mean I have just glanced through it—I have been talking to Your Honor most of the time and I don't know whether there are any [675] other mistakes, because Mr. Goldschein unconsciously has made numerous

mistakes when he has read the testimony to Your Honor and had to be corrected on numerous occasions.

What I'd like right now is the opportunity of examining this presentment. We have not even had a chance to examine it. I just here hurriedly went through it; I have not gone through it to be perfectly frank with Your Honor.

THE COURT: Yes, I must say, Mr. Goldschein, the Court should have the answer. It is not enough, I don't think, for you to say that he refuses to answer them. Here I think you ought to say, give the question and his answer to each one of the five or four questions. I don't think it is fair to say that "I don't know." I think you are absolutely correct, if my memory serves me; on a formal presentment I think you should give the answers that he made. I think, for instance, you should say——

MR. GOLDSCHEIN: Here is the answer.

THE COURT: Let me talk a minute. Here is the formal presentment that you have chosen to prefer against him.

MR. GOLDSCHEIN: Yes.

THE COURT: "Are you in the numbers business now?" You should have the answer after this, and you should say what he did say, "I claim my Constitutional privilege," so this Court could pass on it.

[676] And the second question, you asked the question and you should put his answer.

MR. GOLDSCHEIN: Who said the answer isn't there as it is in the transcript?

THE COURT: I said it, because it isn't there. Here it is. All you have to do is look at it.

MR. GOLDSCHEIN: The first two?

THE COURT: The first two questions.

MR. GOLDSCHEIN: May it please the Court, if a witness refuses to give an answer——

THE COURT: He has to open his mouth and say something, he says, "I refuse to answer." It ought to be in quotation marks, the same as anything else, as the same question asked him.

MR. GOLDSCHEIN: May it please the Court, the issue before the Court is whether or not this witness refused to answer the particular questions.

THE COURT: That is right. How do I know whether he answered them if there is no answer there?

MR. GOLDSCHEIN: Because the question was raised in this court and the Court ordered him to answer, and the Grand Jury is now charging that he did not answer. Proof isn't necessary in indictment.

THE COURT: No, that is right.

[677] MR. GOLDSCHEIN: I think I can point out this to Your Honor: What they are asking is for proof in the presentment. Now, it isn't necessary to set out proof in the presentment. The Grand Jury is charging that he refused to answer the questions.

Now, he was brought into court and he told the Court that he refused to answer the questions. The Court ordered him to answer the questions.

Now, the Grand Jury says to Your Honor that he did not answer those questions. That is presentment.

Now, Your Honor is not expecting proof in the presentment?

THE COURT: You thoroughly misunderstand me. I am not asking for proof. You have chosen to make a formal presentment instead of an oral presentment. If you do so make, if you put the question in you should put his answer so that this court may have it before them formally. I know the answer, I am not saying that I don't, but I don't know why you chose to put two questions one after another, just saying in a previous paragraph that he refused to

answer, whereas you go on in other questions and you go into detail and ask him questions about his business, 1133 Diamond Street, and then you come down and you put his answer in. I think formally this Court should have before it his answer now since it is a [678] formal presentment; I think an orderly procedure it would seem to me, would require it. "Are you in the numbers business?" "Answer: I refuse to answer", not go on with another question, and say that "Did you during the past year operate a bookmaking establishment?" and no answer in the formal presentment. You should have an answer, the question and answer, as you did in here, as I glance through them, in 7, 8, you have his answer there, you have it in 11, "Well, I refuse to answer the question because it will incriminate me." That should follow the first two questions. I am not asking for proof. If it is proof you put in proof by putting in the answers.

Then 8 is superfluous, so is 11.

MR. GOLDSCHEIN: Yes, sir, they are superfluous.

THE COURT: I think they are not superfluous, and I think the answers should be here. "Are you in the numbers business now?" You should have his answer, "I refuse to answer because it incriminates me."

This is a formal matter. You have chosen to make it so. It is a formal presentment. You should have the question and the answer so that this Court can call for it and see the nature—I think that ought to be changed.

I think it is very well taken, his answer should be there on the formal presentment.

MR. GOLDSCHEIN: If Your Honor don't want to [679] hear me on that——

THE COURT: No, I don't want to hear you.

MR. GOLDSCHEIN: All right.

THE COURT: I want the answers to the questions that were posed to him and his answers in the formal present-

ment, so that this Court can say formally that he has not answered. I can't take your averment in the petition that he refused to answer questions. As long as you chose to be specific I think you should be specific and put in his answer. I know no reason for not putting it in.

MR. GOLDSCHEIN: Well, we thought, may it please the Court, it was redundant, would make a presentment twice as big as it is were we to put all the answers.

THE COURT: That isn't true. You put it in 7 and 8, you put it in every one of the others except those two.

MR. GOLDSCHEIN: Weren't those questions raised in open court? Didn't the Court hear the questions and answers raised?

THE COURT: That is quite true, but now we have a formal presentment presented. I can't say, and look back that he said he didn't, he wouldn't answer. There is no reason——

MR. GOLDSCHEIN: Of course, that is the issue [680] before this Court.

THE COURT: That is right.

MR. GOLDSCHEIN: He wouldn't answer.

THE COURT: That is right, and we ought to have it here in the presentment.

MR. GOLDSCHEIN: I thought that presentment had too much in it as it is, but if Your Honor rules otherwise, why we will make it in accordance with the Court's ruling.

THE COURT: I want the answer that he allegedly made before I—I don't want your saying that he refused to answer these questions, two of them, and then in the rest of the questions you do put his answers in.

Now, when can this—this could be changed rather quickly, it seems to me.

MR. GOLDSCHEIN: Yes, sir, it could be changed——

THE COURT: In a half hour?

MR. GOLDSCHEIN: Yes, sir.

THE COURT: All right, let us put the answers to those questions in, and in the meantime I will examine this motion. We will recess until—well, I don't know. What time do you want to change that?

MR. GOLDSCHEIN: We ask that the presentment be recommitted to the Grand Jury for the inclusion of those [681] two answers.

THE COURT: Answers to those two questions.

MR. GOLDSCHEIN: Is that motion granted, may it please the Court?

THE COURT: That motion is granted.

MR. WITKIN: Before you limit that, will Your Honor give me a chance to read the entire presentment?

THE COURT: No.

MR. WITKIN: I mean, there may be other questions of the same category.

MR. KOSSMAN: We will have the court stenographers to check up on that.

MR. WITKIN: May I state on the record, then, if Your Honor please, that this presentment was handed to counsel, co-counsel and myself at the bar of the Court?

THE COURT: That is right.

MR. WITKIN: But I have not yet had the opportunity of reading the presentment in its entirety. I am therefore unable to make any other objections other than those that I noticed on a quick glance through the presentment, and I reserve the opportunity if after reading the presentment further there are any other inaccuracies that I may call them to Your Honor's attention, and ask Your Honor to act upon them.

[682] THE COURT: That is quite right. You will be given at least twenty minutes to a half hour to go through it.

We will recess until say 11:15.

MR. KOSSMAN: Just to keep the record straight, I have filed a motion to dismiss the presentment, but of course there is no presentment now before the Court.

THE COURT: You will be given an opportunity to renew it.

(Recess at 10:45 A. M.)

---

[683] AFTER RECESS.

THE COURT: All right, Mr. Goldschein.

MR. GOLDSCHEIN: May it please the Court, the Grand Jury is ready to return the amended presentment as ordered by the Court.

THE FOREMAN: Your Honor, may it please the Court, the Grand Jury will offer their amended presentment.

(The presentment was handed to the Court.)

MR. KOSSMAN: For the record, I file a motion to dismiss.

MR. WITKIN: May it please the Court, there has been so much said here about delay that I sincerely hope and trust that Your Honor doesn't think that any of these motions or corrections we are making are capricious or intended for delay. As far as I am concerned, with respect to the Court—and I say it most respectfully—I am willing to work Saturday and Sunday to clean up this case. I would prefer it, because of the fact that I have other duties with the election coming that will take me in my official capacity. And therefore, when I arise here, I arise with some timidity, because it looks as though we are trying to delay. I am not.

Now, here, as I find the situation, it is just as bad as it was before, if not worse. I take the original [684]

presentment that Mr. Goldschein had given you, and on page 3 he had, "Are you in the number business now?"; then in the additional presentment, on page 3, he gives the answer that was given by this witness the first time he appeared before the Grand Jury, or the second time he appeared before the Grand Jury, but he doesn't give the answer that the witness gave on Monday, October 30, 1950, when he last appeared before the Grand Jury, and when he last answered the question, "Are you in the number business now?" The answer that appears there—and instead of asking the stenographer, and calling the stenographer, and getting the clerk who took the record, in order to arrive at factual questions, I am trying to do it the short way, to avoid that—because I have his answer to the question that he gave on page 3 on October 30, and Mr. Goldschein or the Grand Jury haven't incorporated it.

THE COURT: There is 3a, and 3b—also 3. Which are you talking of?

MR. WITKIN: 3.

THE COURT: My copy has 3, 3a, and 3b. Do you mean 3 without any letter at all?

MR. WITKIN: If Your Honor please, I just got this. Just let me see.

THE COURT: 3 without any letter? I have 3, 3a, and 3b in my copy.

[685] MR. WITKIN: Well, my statement applies to all, because it is not incorporated in 3, 3a, or 3b.

THE COURT: Well, what is your complaint?

MR. WITKIN: Here is the answer that was given.

THE COURT: The answer to what question?

MR. WITKIN: To question 1 appearing on page 3, "Are you in the number business now?" The answer that was given on Monday, October 30, 1950, was, "I refuse to answer this question for the reason that my answer would

tend to incriminate me, and I stand on my Constitutional rights. In further answer to this question, I desire to incorporate into the record as part of my answer a statement which I have made before the Honorable Judge J. Cullen Ganey in connection with this question." Then the witness read half of that answer. When he was reading the statement, Mr. Goldschein, in that answer to question number 1, "Are you in the number business, now?" then said to the witness, "You needn't read it all. We will incorporate it in your answer."

Now, nowhere on page 3, 3a, or 3b, is the witness' answer to the question, "Are you in the number business now?" made before the Grand Jury on October 30—nowhere. This answer that he gives here was not made on October 30, it was made on a preceding day, and for fear of [686] being wrong in my date, I don't want to give the Court the date.

Now, we are doing this in a hurry, apparently, and therefore we are not getting it right, because Your Honor knows that if we don't raise these questions now, we are forever estopped, because as to the doctrine of self-incrimination it is said by a learned justice, you have got to be in constant combat to protect your rights.

Therefore, now, on that we have the wrong answer. We have part of an answer.

THE COURT: Well, he refuses to answer; he refuses to answer the question.

MR. WITKIN: Yes, that is right, but it is not what he said. We are entitled to have——

THE COURT: No, I am the judge of the facts here. The question was posed to him, he made an answer, he did say that he wanted to read a statement, and in that statement he said that he had certain legal grounds, and I took cognizance of them then. I take cognizance of them now. And he refuses to answer. That is all I am concerned with.

MR. WITKIN: But this answer in the presentment is not the correct answer as given by the witness.

THE COURT: Oh, I wouldn't question counsel's integrity now.

[687] MR. WITKIN: Well, it is Mr. Goldschein who admitted it, because he read it to you. I am not questioning counsel's integrity at all.

THE COURT: Here is a question, "Are you in the numbers business?" and he refuses to answer. Now, I will be the judge of the fact. I will take this record as right. If it is wrong——

MR. WITKIN: Therefore, may I make this motion for the record?

THE COURT: Yes, make your motion.

MR. WITKIN: May it please Your Honor, I move that the Grand Jury presentment be further amended so that it will incorporate, on page 3, in answer to the question, "Are you in the numbers business now?" the full and complete answer given by the witness, Irving Greenberg on Monday, October 30, 1950, when he appeared before the Grand Jury.

THE COURT: What was that now, if you know it? What was it?

MR. WITKIN: I have read it to you, just a moment ago.

THE COURT: Well, incorporate it, then. Put it on the record. Have you any objection, Mr. Goldschein?

MR. GOLDSCHEIN: No.

THE COURT: Read it. Put it on the record.

[688] MR. WITKIN: All right.

> "I refuse to answer this question for the reason that my answer would tend to incriminate me, and I stand on my Constitutional rights. In further answer to this question, I desire to incorporate into the record, as part of my answer, a statement which I have made

before the Honorable Judge J. Cullen Ganey in connection with this question."

And then he reads, "If Your Honor pleases, the reason why I have refused to answer such——"

THE COURT: We can incorporate that without reading it. It has been read here many times. We will just incorporate that as part of the answer and give it to the court stenographer.

MR. WITKIN: That is entirely satisfactory.

MR. GOLDSCHEIN: Let me see what you have just read and want to incorporate.

MR. WITKIN: It is in the record already. All they have to do is copy it.

MR. GOLDSCHEIN: What he read from the witness stand?

MR. WITKIN: Yes.

MR. GOLDSCHEIN: Well, repeat what he read from the witness stand.

[689] MR. WITKIN: The Judge has just told me not to.

THE COURT: I want to save time.

MR. GOLDSCHEIN: I don't mean for him to read it now—I mean we will include the statement the witness read from the witness stand.

THE COURT: Yes, that is right.—Allegedly from that paper. I take it it is the same, but we will have the record as he gave it from the witness stand.

(The answer referred to is copied into the record as follows:)

"A. If Your Honor pleases, the reason why I have refused to answer certain of the many questions put to me by Mr. Goldschein before the Grand Jury is because my answers to these questions will incriminate me in a violation of federal criminal statutes, among which would be the violation of the Internal Revenue

laws, and particularly 26 U. S. C. A., Sections 145 (a), (b) and (c), as well as 26 U. S. C. A., Sections 1625 (a) and 26 U. S. C. A., Section 1626 (a), (b) and (c).

"In my income tax returns for the years immediately preceding 1950 I have stated a certain local business in which I was engaged. In addition thereto, I have listed other income under the heading of 'Miscellaneous'. Were I to answer with respect [690] to those years immediately preceding 1950, that I was engaged in another business, I would tend to incriminate myself with respect to the statutes and the sections hereof that I have just mentioned. Were I to admit that I was in another business, lawful or unlawful, in these previous years, from which I have filed a return, I would be incriminating myself. Were I to admit that I was in another business that had a gross income from which there would have been deducted gross expenditures, including payment of employees, Your Honor, I would be incriminating myself. These incriminations would be with respect to these violations of the Federal Income Tax laws.

"Now, may it please Your Honor, with reference to the year of 1950, it is true that I have not yet filed my return for that year, and need not until March of 1951. But, may it please Your Honor, if I were to answer those questions which I have refused to answer, I will tend to incriminate myself of violations of the Federal Income Tax laws of the sections hereinabove referred to, and argued at length by my attorney on Friday last. May it please Your Honor, if I admitted that I had a business other than the business that I have mentioned to the Grand Jury, if I [691] admit that in that business I had employees, then I know that my answer will tend to incriminate me in the violation of Sections 1625 (a), 1624 (a), (b) and (c), as well as Sections 145 (a), (b) and (c) above re-

ferred to. Were I to admit that I had no records and kept no account of my other business, lawful or unlawful, other than the business testified to, I would be incriminating myself in a violation of the Federal Income Tax laws. I know that if I admitted being in any other business, lawful or unlawful, and had employees in the operation of that business and/or if I admitted that I did not withhold the tax due to the United States Government, I would be incriminating myself not only in violation of the income tax laws which I have enumerated above, but that I may tend to incriminate myself with regard to conspiracy charges in connection therewith. I also believe that answering the questions which I have refused to answer may tend to incriminate me in violation of the False Statements Statute of the Federal Criminal Code.

"My fear and apprehension that I would tend to incriminate myself is based upon not only that which I have read in the newspapers but also upon the fact that Morton Witkin, Esq., of my counsel in whom I have [692] great trust and confidence, has advised me that it is his honest and sincere opinion that were I to answer the questions referred to I would be incriminating myself. I believe that his advice is sound and I choose to rely upon it. May I say in conclusion that these two reasons are in addition to and not exclusive of my own inherent belief of self-incrimination due to the fact that I have knowledge of what my answers to the refused questions would be."

MR. WITKIN: Now, on page 3a, the question, "Now, did you during the past year operate a bookmaking establishment? That is the past year, 1950, Mr. Greenberg?" As it is written here, the answer is, "I refuse to answer." Then it has asterisks. The correct answer to that question, made on the date referred to, was the same answer as now appears on page 3, as presented in the amended presentment.

THE COURT: Well, go on to page 3b. That covers it.

MR. WITKIN: Now, wait a minute. Excuse me for saying, "Wait a minute."—I said it unconsciously. I would like to get this clear. I move now to amend the presentment so that the answer to Question 2, which I have just read, incorporate that which appears on page 3, marked, "Answer," and goes down, down commencing with the word, "I [693] refuse to answer," and goes down to 3a, "this Federal Grand Jury," because that was his answer.

THE COURT: Is there any objection to that, Mr. Goldschein?

MR. GOLDSCHEIN: I don't know what he is reading from.

MR. WITKIN: In other words, he answered that question by repeating that, down to here (indicating), on that date.

MR. GOLDSCHEIN: You want to add this?

MR. WITKIN: That answer that he gave to the previous question.

MR. GOLDSCHEIN: That is all right.

(The matter referred to is made a part of the record as follows:

A. I refuse to answer that question, and the reason I refuse to answer that question, ladies and gentlemen of this Grand Jury, is that I have refused to answer this question previously. My reason for my refusal to answer this question is because the answer I would give you will tend to incriminate me of a violation of the Federal Criminal Statutes. I believe that my testimony before this Grand Jury will incriminate me. Therefore I claim my privilege, under the Fifth [694] Amendment to the United States Constitution not to give evidence against myself. I also invoke the quasi judicial protection of the Attorney General and his deputies as well as the judicial protection of the Court. I will not now, or hereafter, waive my right

not to incriminate myself, and nothing I say or do is a waiver of that right. In the event that, having claimed this right, I am further questioned, or in the event that I am directed to answer further questions by the Deputy Attorney General, or the Grand Jury, or the Court, I shall claim, when and if the occasion arises, the right to stand on my constitutional rights and not to give evidence or testimony against myself that would tend to incriminate me in a violation of any Federal Criminal Statutes. My refusal to answer the question is respectfully based upon the additional reason that this question is not relevant to the inquiry being conducted by this Federal Grand Jury."

MR. WITKIN: Now, in addition to that, may it please Your Honor, I move that the answer given on Monday, October 30, 1950, to that same question, which answer was as follows, be added to the amended presentment. And I read the answer to that.

The question is as set forth on page 3a, [695] marked 2.

"I refuse to answer this question for the reason that my answer would tend to incriminate me. I stand on my Constitutional rights, and ask that the statement which I have made before the Honorable J. Cullen Ganey be incorporated as part of my answer to this question."

Is that agreed to, Mr. Goldschein?

MR. GOLDSCHEIN: Yes, that is agreed to.

MR. WITKIN: Now, may it please Your Honor, on page 4 of the amended presentment, the answer to Question 8, "What is your answer?"—that reads, as it does, and it ends with the words "as I stand on my Constitutional rights." And after that, there are asterisks. I take it that Mr. Goldschein will agree with me that, in addition to that answer, he, the witness, added the same statement he made with regard to the statement he made before Your Honor.

THE COURT: Is that correct, Mr. Goldschein?

MR. GOLDSCHEIN: He asked, "I ask the same statement that I made before the Honorable J. Cullen Ganey be incorporated as part of my answer." Is that the part?

MR. WITKIN: Yes.

MR. GOLDSCHEIN: Yes.

MR. WITKIN: Now my same request goes to the [696] answer to Question 11, and in order to shorten it, to Question 13.

MR. GOLDSCHEIN: Right.

THE COURT: All right.

MR. WITKIN: Now, may it please Your Honor, in order that we might not, if it ever became necessary, be charged with not performing our proper duty, I do not know whether or not the Court—and I say this respectfully—has the right to permit these amendments, or whether the Grand Jury must amend them themselves. Therefore, I raise the question that the Grand Jury, in order to have the matter properly on record, would have to make these amendments and agree upon them, and that it is beyond the power of Your Honor—and I say that most respectfully and humbly—to amend that which a Grand Jury has presented. And therefore these incorporations that I have made, it would seem to me, as a matter of law, would have to be made by the Grand Jury, and with another amended presentment, in order to have orderly procedure, would have to be made.

MR. GOLDSCHEIN: It is not a matter of substance, may it please the Court, it is purely a matter of form, and the questions that the witness is charged with are set out very clearly. We agree to these particular matters, because counsel seems to think they are important to him. We don't [697] have to prove or refer to evidence in the Grand Jury. We set out in the presentment what the witnesses asked, his refusal to answer, the questions were presented to the Court, the Court ruled thereon, those matters are set out

clearly, he was called back before the Grand Jury, and refused to answer. The sole question before the Court now is whether or not the witness will or will not comply with the order of the Court to answer the specific questions. It is necessary to have no more in a presentment than to set out the particular questions that he was ordered by the Court to answer, and he refused to answer, namely, five questions. And that is sufficient in a presentment to notify the respondent what he is charged with. This is not a criminal proceeding; it is sui generis. It stands out by itself; it is different from all other proceedings. It is in the nature of a criminal proceedings, and all the cases refer to it as such.

MR. WITKIN: May we agree, Mr. Goldschein, then, that the motions that I have made, that have been allowed by the Court, that in considering this contempt proceeding, we now consider it as if the motions granted by the Court and the insertions put therein, are part of th[illegible]nended presentment of the Grand Jury?

MR. GOLDSCHEIN: Yes, sir.

[698] MR. WITKIN: That is agreeable.

Now, may it please Your Honor, I don't know what the situation is with regard to the trial of this contempt proceeding. My understanding—first of all, I would like to correct Mr. Goldschein when he says that counsel requested a written presentment. Neither Mr. Kossman nor I at any time requested either an oral presentment or a written presentment or any presentment; therefore, Mr. Goldschein is inadvertently in error when he says that we requested a written presentment.

Now, up until this morning we were told to be here at ten o'clock. I remember distinctly Your Honor saying that we would be here at ten o'clock for the purpose of disposing of three motions that were made by Mr. Kossman on Monday or prior thereto which Your Honor hadn't yet decided.

Mr. Kossman also filed certain motions yesterday. Now, we were presented this morning with a contempt presentment, and it is in the nature of a criminal trial.

I ask for a continuance for this reason: That in no case in the history of the United States Government of America was ever a witness or a defendant compelled to go to trial within a number of minutes after a presentment was made. Irrespective of the fact that we knew, and I frankly [699] admit of record—I have no hesitancy of saying that we knew the presentment was going to be handed down because Mr. Goldschein's statement in court practically said so, and if I were to say that I didn't know it, that I am surprised, I would not be keeping faith with this Court—but we didn't know the nature of the presentment. We didn't know all the details connected with it.

Now, we got them. In the Camarata case they allowed six days. In the Howard case they allowed five days. I don't want six and I don't want five. I want a reasonable length of time within which to prepare our case.

For example, we couldn't subpoena a witness to appear before we knew there was a contempt proceeding because we wouldn't have any caption for any case.

Now, may it please Your Honor, this case will probably take some time.

THE COURT: Why would it take some time, Mr. Witkin?

MR. WITKIN: Because we feel that we would have to present it fully and completely. We feel that we would have to show certain facts. I could outline them——

THE COURT: You aren't going to trial. I will tell you now in advance with reference to it. You won't get any jury trial.

[700] MR. WITKIN: We aren't asking for a jury trial. There is no request for a jury trial.

THE COURT: This will be summarily disposed of by the Court.

MR. WITKIN: Now, may it please Your Honor, this is a trial. This is a trial before Your Honor. It isn't a jury trial. We just got the presentment. It is the same as getting an indictment.

Now, my motion is very simple. All I want is until Friday morning. I don't want to have any more time. I am willing to work Saturday and I am willing to work Sunday, if it is necessary and if it pleases the Court.

THE COURT: Now, the trial of it, as you want to advert to it, isn't going to take a long time.

MR. WITKIN: It will take a long time.

THE COURT: We are going to get over it very quickly. Our procedure here will be the same as has been adopted before. I am going to call him to the bar of the Court and I am going to ask him whether he refused to answer these questions before the Grand Jury and give him an opportunity to answer them now, and then I will give you an opportunity, if you so wish, to offer evidence to us or go forward, if you will, to show that these questions, he does have reasonable ground for the apprehension of danger. [701] Now, I might say you have taken a lot of time heretofore in trying to convince the Court of that. I am not going to go into a repetition of that. That is in the record now.

Will you please sit down, Mr. Kossman? I don't like to be discourteous, but if you insist on being discourteous to your associate as well as to the Court, Mr. Kossman, I must say something. I can't listen to you and to Mr. Witkin.

Now, that is the procedure. I am going to say to you now I want an offer of proof in advance because I want to know what each witness you are going to call will testify to.

Now, I am going to limit it. I am not going to restrict it to anything that is not material, but we are not going to have a long delay. Whether you call it a trial or what you call it or what you label it doesn't make any difference.

MR. WITKIN: I would say that if Your Honor gives us an opportunity of an offer of proof, then if Your Honor overrules us we have our right protected.

THE COURT: Let us hear from Mr. Goldschein about Friday.

MR. WITKIN: I can't find fault with that at [702] all.

MR. GOLDSCHEIN: May it please Your Honor, these questions aren't new.

THE COURT: I know they aren't.

MR. GOLDSCHEIN: This matter has been before the Court for three weeks. It seems to me——

THE COURT: They say they have certain witnesses whom they want to call. If it weren't for that fact I would have them proceed immediately. He says there are certain witnesses they want to call and that they haven't been able to get who they want to call to offer here in mitigation, if you will, in showing that this witness does have reasonable ground.

MR. GOLDSCHEIN: Why can't we come here tomorrow morning? Can't we get the subpoenas served by tomorrow morning?

MR. WITKIN: I would like to answer Mr. Goldschein. First of all, in every case—I am like Mr. Kossman. I dislike to get personal, but for example in the Howard case where you objected to five days and the Court granted five days, it became a very moot question as to whether that was sufficient time, and in the Camarata case the Court granted six days. I think we are eminently fair when we only ask for two days.

[703] The reason I can't go on tomorrow is twofold. One is, I don't think it is sufficient time. For example, as to these offers of proof, frankly we are going back to the office and preparing them so that I can hand them up to you in writing. I can't do it in one day. And secondly, I happen to have another case specially listed for tomorrow and I would like to dispose of that other case. Of course I realize this Court is just as important as the other, but forgetting that second reason—it is minor legally—I know that—but the first reason is the important reason. We will save time if Your Honor will take it on Friday instead of tomorrow.

THE COURT: How many witnesses do you now contemplate calling?

MR. WITKIN: I know you are putting me on the spot in answering that.

THE COURT: No, I am not at all. I am just trying to get an idea of time.

MR. WITKIN: I would have to talk to Mr. Kossman to give you an answer. For example——

THE COURT: Mr. Kossman has been wanting to talk all morning. Suppose you ask him.

MR. KOSSMAN: Do I have your permission, Your Honor?

[704] It is very difficult for me to keep quiet when I hear him say it isn't a criminal case.

THE COURT: I don't want you to interrupt your associate. It makes it difficult for me to hear him. I can't hear your associate when you talk.

MR. WITKIN: Mr. Kossman advises me that he feels there will be about four witnesses. I don't want to be limited to that and I don't want to make that as a statement to the Court one way or the other, but I do say to Your Honor that we have our own thought as to how to

prepare this case. Your Honor may not hear us, but certainly Your Honor isn't going to stop us from making offers. Your Honor can then overrule me and we will get an exception. We at least keep the record in shape. In other words, I don't think either Mr. Goldschein, and I know Your Honor wouldn't presuppose to tell us what evidence we ought to present.

THE COURT: I certainly would not.

MR. WITKIN: Therefore, I say to Your Honor that it will save us time in the long run. It is only a short request. I am only making it until Friday purposely, as I want to speed as much as Mr. Goldschein wants it. I will work all day Saturday, if Your Honor wants to, and I hope I am not putting any unnecessary burden on you, but I am perfectly willing to do so. I will come here Sunday to work [705] if Your Honor wants to work on Sunday, if the case is that important to the Government. I know usually you don't work on Sunday and the Court shouldn't work on Sunday except in case of an emergency, but I will come here on Sunday so Mr. Goldschein can't say we are delaying these proceedings.

THE COURT: Do you work on Sunday?

MR. GOLDSCHEIN: I work on Sunday anyway, whether it is here or upstairs. If Your Honor please, I want to call Your Honor's attention to this, that in those cases where there was an obstruction in the business of the Grand Jury and it was in the nature of misleading statements in the form of perjury that obstructed, the Court gave them ample opportunity to call their witnesses in three or four days, but where there was Constitutional privilege claimed on certain questions and the witness knew right along what the questions were, and they were limited in number, and there was nothing confusing and not much to study about, the Court proceeded this way. In the Alexander case the C. C. A. raised no question about the speed in which it was handled. Witnesses went before the Grand Jury in

the morning and were asked the questions at ten o'clock and they refused to answer the questions—I believe about six or seven questions, maybe ten at the most. They claimed their Constitutional right and they were brought down before the Court and they stood on [706] their Constitutional objections and the Court heard what they had to say about it and ordered them to answer. They were then brought back before the Grand Jury on the same day and they refused to answer the questions before the Grand Jury and on that day presentments were returned and they were tried on that same day, and of course we wound up a little late at night. Of course we were there until about 11:30.

THE COURT: Wasn't there a request by counsel for a continuance for witnesses?

MR. GOLDSCHEIN: Yes, sir, but the question had been argued all day long. There was no need—the Court wouldn't hear the reargument of the same issues. There was just ten questions.

MR. WITKIN: Take my word for it there will be new questions involved in this case because we are going further in the contempt proceeding than we went before the Grand Jury. We are going to show that he shouldn't be adjudged in contempt because we feel that in these proceedings we can go further than we did in so far as the answers, along the line of questioning that Your Honor suggested.

MR. GOLDSCHEIN: Please wait until I finish.

MR. WITKIN: Haven't you finished?

MR. GOLDSCHEIN: No.

MR. WITKIN: I beg your pardon.

[707] MR. GOLDSCHEIN: In the Rogers case, may it please the Court, it was somewhat the same way. There was no limitation as to the time the trial took. The question was as here, when they must go to trial. This matter has been

pending. The witness knew what the questions were for the past three weeks, I believe.

THE COURT: Judge Maris in the Camarata case said that due process requires that the witness should be advised of the charge and have a reasonable opportunity to meet them by way of defense or by way of explanation, quoting the Crook case. I am inclined to agree with you.

MR. GOLDSCHEIN: Three weeks they had.

THE COURT: Six days.

MR. GOLDSCHEIN: Greenberg has had three weeks.

THE COURT: That is right. The democratic process at times encumbers and it protects them. It may well be that it gets tiresome, but I probably feel that in the long run it will be better. I will recess this until Friday morning at ten o'clock.

MR. WITKIN: Mr. Kossman has some legal reasons other than my reasons for a continuance based on the disposing of the motions before Your Honor and may I ask Your Honor to hear Mr. Kossman?

THE COURT: Do you want a ruling on the motion to discharge?

[708] MR. KOSSMAN: Sir?

THE COURT: Do you want a ruling on the motion to dismiss the presentment?

MR. KOSSMAN: Yes.

THE COURT: I am denying each one of them seriatim from 1 to 5, inclusive, and you have pending also a motion to discharge Irving Greenberg as a witness before the Grand Jury. As I read this you incorporated in your motion to dismiss every one of the reasons you have in your motion to discharge Greenberg.

MR. KOSSMAN: That is right, but I filed that motion before the presentment.

THE COURT: That is right, but they are both undisposed of, and since they are both identical I deny both.

MR. KOSSMAN: In the first place, I must say this to Your Honor because it is fundamental, although we are on the wrong track. I am astounded that Mr. Goldschein has said that this is not a criminal proceeding. The only reason we can be in here, if Your Honor pleases, under Title 18, Section 401, "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as—misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice," which repealed Section 28, 655. [709]

THE COURT: Let us not go into that.

MR. GOLDSCHEIN: The Grand Jury is here and wants to leave.

MR. KOSSMAN: I have asked that they leave before.

THE COURT: Is your motion to ask the Grand Jury to withdraw?

MR. GOLDSCHEIN: Yes.

THE COURT: Before they go I want to ask the Grand Jury personally, will the Grand Jury please stand.

(The members of the Grand Jury stood up.)

THE COURT: I want to ask you if this presentment as presented by your foreman is your amended presentment against the witness Irving Greenberg.

THE GRAND JURORS: It is.

THE COURT: All right.

[710] MR. KOSSMAN: So it is a criminal proceeding. That is number 1.

Number 2; I won't go into any more discussion about the factual reasons for the continuance because in the case that he spoke about, the Alexander case, the Circuit Court

did talk about the undue haste of the proceedings. But that is finished.

Now, in accordance with the suggestion of Your Honor, you asked me to file reasons for a motion to continue a criminal contempt trial. This is most important. I have this motion here, and in view of the fact——

THE COURT: It's been continued until Friday, your associate——

MR. KOSSMAN: That was for a factual reason, now I am giving the legal reason why under the law of the land this case can't proceed.

THE COURT: All right. Mr. Witkin is arguing the facts and you are arguing the law, is that it?

MR. KOSSMAN: That is correct, from a factual standpoint.

THE COURT: All right, I just wanted to know.

MR. KOSSMAN: If the Court please, on October 17, 1950, as you well know and as Mr. Goldschein knows, a subpoena duces tecum was served on him asking him to bring [711] with him all the records concerned with the investigation of Irving Greenberg.

MR. GOLDSCHEIN: Is this a new motion?

MR. KOSSMAN: Yes, it is a new motion in terms of continuing the case until the United States Supreme Court has decided the pending case on its docket. Let me finish.

MR. GOLDSCHEIN: May I have a copy of it?

MR. KOSSMAN: Just a moment, just a moment. Is that your objection?

MR. GOLDSCHEIN: I am sorry, may it please the Court, I didn't mean to speak out like this, I just want a copy.

THE COURT: That is all right.

MR. WITKIN: You are certainly entitled to that if Mr. Kossman can find it.

MR. KOSSMAN: I didn't know you placed so much faith in what I write.

MR. GOLDSCHEIN: I don't.

MR. KOSSMAN: Well, you are not the only one. On October 18—and the Court well remembers that Mr. Goldschein did not produce the matter asked by the subpoena, and I asked that he be held for contempt, but very graciously you allowed until tomorrow morning, and then he filed a motion to quash, which gave a [712] reasonable excuse for not answering the terms of the subpoena.

Now, the reason that he gave for quashing the subpoena is because, he said—and that is the only reason—that there is no authority under the law for the compulsory production of the testimony or documents referred to in said subpoena duces tecum by the Attorney General or the Special Assistant.

The Court took this motion under advisement after argument on October 18, 1950, and as of October 31, 1950, has not yet rendered a decision.

THE COURT: I can say to you again, don't rehash all that.

MR. KOSSMAN: Just a moment, if the Court pleases, if I make a motion——

THE COURT: I told you, and now again, that I will on a proper showing—the books and records are available to this Court, they are here, and if you don't like that ruling you take an appeal. There is no use, continued reiteration isn't going to be any more persuasive on my ruling.

MR. KOSSMAN: I have long given up hope by persuading Your Honor, I am talking to Your Honor, but I have my eye on the court stenographer.

THE COURT: And the Court of Appeals.

[713] I want to know the motion. You don't need to go into the background, I have been on this, I dream about

it for the last three weeks, day and night; why rehash all that?

MR. KOSSMAN: At least Your Honor dreams about it, but I have sleepless nights.

THE COURT: Maybe the Court joins with you in that.

MR. KOSSMAN: And so does Mr. Greenberg.

THE COURT: What is your motion, Mr. Kossman?

MR. KOSSMAN: Here is my motion. In view of the fact—now, I have not made this motion before, this is a new motion because I couldn't make a motion to continue a criminal contempt trial without one being scheduled.

Now, in view of the fact that there is now pending U. S. v. Regan, number 83 on the list of cases in 1950-51 Appellate Docket of the United States Supreme Court, the following questions, namely the Department of Justice order No. 3229, and that the Supreme Court has refused to accord departmental immunity.

And furthermore I have read the Government's brief that opposed the petition for a writ of certiorari which was granted, and the Government there didn't claim privilege. The Government made a factual defense.

[714] They said, "Since there was not"—I will read you now from the Government's brief in this case—"in this case an unqualified refusal to produce the documents involved—" we have that here—"questions raised by the petition as to the validity of the Department of Justice Order 3229 providing for nondisclosure, and the judicial power under the Constitution to go behind in the executive determination that disclosure should not be made, are not presented for decision."

You follow my thought? That was the Government's contention. They said, look, we did refuse to produce the documents; and of course our case is infinitely much stronger because as I aver here Max H. Goldschein has

stated to the Court "Neither the Department of Justice nor the Attorney General intends to let Mr. Kossman have any of its records." Notes of testimony, page 309; can't be any more emphatic about that.

Here is the law. I know that this is a court of law, and that is why I am going to read this statement, this is the law in every District Court in the country governing a similar situation where an issue is pending before the United States Supreme Court in another case—and of course I won't go through the facts of that case, I have given even to you the brief of the certiorari—they are pleading [715] please give me back my brief—"In another case in which certiorari has been granted the issue is obviously important and the question which is identical with or similar to the issue pending is also obviously important—" the same question, and the United States Supreme Court under those circumstances, when one case is pending, they will either grant the petition for certiorari when you apply for one, or postpone consideration of the petition under the other cases that have been decided and then make a summary disposition of the case in accordance with that decision. Supreme Court Practice by Stern and Gressman, page 113.

Now, furthermore, I allege that it is the law of the land that where the United States institutes criminal proceedings in which evidence otherwise privileged under a statute or regulation becomes importantly relevant, it abandons the privilege—and I am quoting 59 Harvard Law Review 1165, which Your Honor has more than a slight acquaintance with.

Now, my final averment is this, and I am saying it with all the legal emotion and with my whole heart, because it is so important that we have due process, especially due process when the Government insists on hurrying up, that is the time that procedural due process arises and stands for what that flag is.

[716] Now, I aver that to proceed with a criminal contempt trial under the circumstances set forth in the preceding paragraphs would be contrary to the accepted customary trial practice in the United States Court and would render great hardships and difficulties to the petitioner in this trial. Unquestionably it is so.

Now, therefore, for all the averments that I have stated here, and for any other averment that Your Honor feels is important under the circumstances, I think that the criminal contempt trial should be continued until the United States Supreme Court has decided that issue—and our case is far stronger because he has openly defied by stating "Mr. Kossman will never see or get that investigation."

Now, there is one other thought.

THE COURT: Has that motion been handed up?

MR. KOSSMAN: I am now handing up the motion.

There is another thought that I want to present to the Court, and it worries me, and I don't want to spend another night worrying.

You have stated, oh, there is going to be just one of these things, I mean no proof, we have to make an offer of proof.

When we wanted to make proof, in the notes of testimony you said that is no contempt proceeding, "I don't [717] want to listen to any proof. There is time enough when the case starts."

Well, the case is going to start and we want to present our proof without making an offer of proof. The defendant doesn't have to explain to the Court that he wants to make an offer of proof, he presents his defense.

Of course, if you don't like our defense you can disbelieve it, you can make a verdict of guilty, if you find under the circumstances beyond a reasonable doubt in spite of all my enthusiasm. I always bear in mind that I know

that Your Honor, when the case is presented, will decide that in accordance with the traditions of all our great judges, you will decide this case exactly on the merits.

Now, this is a criminal trial. You are limited, limited in the contempt proceeding under 18, 401, you must make a finding that there is an obstruction to the administration of justice by the refusal of his answering.

It is very important because I am quite mindful that this Court sat in the Circuit Court in a case, and I have the statement that your Court made there, and I must read that, because Mr. Goldschein had argued that case before you.

THE COURT: Yes, he argued it, and I sat on it, so we are all familiar with it.

MR. KOSSMAN: I think it should be brought to [718] the attention of every one in this court room that Your Honor then in 1943 dissented from the Circuit Court. The Circuit Court upheld the contempt proceeding and the United States Supreme Court reversed and upheld Your Honor's contention. This is what you said then, in 1943, and I am sure you will say the same thing in 1950 and in 1960.

You said, "The use of this drastic power wherein a judge sits as an accuser, trier of the fact, and dispenser of punishment, should only be exercised when the obstruction to the performance of judicial duty is clearly shown. I feel it to be of prime importance, no more and no less, that witnesses called in any inquiry should have ease and freedom of mind in testifying, as well that they tell the truth and in no wise hinder the seeking of truth. It is in the proper maintenance of this balance that lies the security of our courts."

And for Mr. Goldschein to come into this court room and say this is a summary proceeding——

THE COURT: I still share that same point of view, Mr. Kossman.

MR. KOSSMAN: Then tonight I will sleep.

THE COURT: We will recess until ten o'clock Friday morning.

(Adjourned at 12:10 P. M. to reconvene at 10 A. M., November 3, 1950.)

DEFENDANT'S EXHIBIT I.

The Philadelphia Inquirer, Thursday Morning, September 14, 1950

(Page 1.)

Justice Dept. Opens Racket Probe Here

All Forms Of Crime To Be Investigated By U. S. Grand Jury

• • •

(Page 14.)

PROBE PRESSED QUIETLY

Goldschein's announcement came without warning but his investigation has been in preparation for weeks. Stemming largely from Federal inquiries in Chicago, Kansas City, San Francisco, Miami and Newark—which turned up racket connections in this area—it has been pressed quietly for weeks by 10 special agents working under Goldschein.

It will extend to rackets in all their ramifications, the Justice Department spokesman indicated. Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws, he said.

CONSPIRACY ANGLE STRESSED

Goldschein himself stressed the importance of "conspiracy" which, the other spokesman said, might lead to tieups between police and politicians and underworld characters.

• • •

The Philadelphia Inquirer, Friday Morning,
September 15, 1950
(Page 25.)

A Justice Department spokesman said that as each witness is called, agents of the Bureau of Internal Revenue are prepared to produce income tax reports so that the jury can check his testimony.

Income tax violations would permit the Government to strike indirectly at racketeers whose activities are not covered by Federal criminal statutes.

• • •

The Philadelphia Inquirer, Sunday Morning,
October 8, 1950
(Page 1.)

Organized 'Mobs' Eyed By Probers

The Federal grand jury investigating crime and racketeers, after a week-end respite, will delve into activities of organized and syndicated "mobs" tomorrow, a Government spokesman said yesterday.

• • •

JUDGMENT.

This matter came to be heard in open court on the sixth day of November, 1950 upon the written presentment for criminal contempt by the duly impaneled and constituted grand jury, September 1950 Term, in the presence of the defendant, IRVING GREENBERG, and his counsel, and the attorneys for the Government, and it appearing to the Court that:

The said IRVING GREENBERG was subpoenaed and appeared as a witness before a Grand Jury of this Court on October 2, 1950, which Grand Jury was conducting an investigation concerning the violations of the criminal laws of the United States, and then and there refused to answer certain questions propounded to him, he claiming that his answers thereto may tend to incriminate him for the violation of a Federal statute; and that

On October 9, 1950, he appeared with his counsel before this Court where the claim of privilege of the said witness, IRVING GREENBERG, was challenged by the Government, and the Court heard the questions propounded to the witness and the answers he made thereto; and that, thereafter, on October 16, 1950, the Court, after hearing argument of counsel for the witness, found that there was no real and substantial danger of incrimination to the said witness, IRVING GREENBERG, for the violation of a Federal statute and ordered him to return before the Grand Jury and answer the questions which he had refused to answer.

And it further appearing to the Court that IRVING GREENBERG was recalled as a witness before the said Grand Jury, at which time the said Grand Jury continued its inquiry in connection with the matters hereinbefore described, and again each of the said questions which the Court ordered him to answer, were asked of the said witness, who then answered some of the questions but persistently refused to answer other of said questions, as well as additional questions, propounded to him, stating categorically

that he refused to answer each of the questions on the ground that it would tend to incriminate him for the violation of a Federal statute; and that

On the 30th day of October, 1950 the witness, IRVING GREENBERG, again appeared with his counsel before the Court, where the claim of privilege of the said witness was again challenged by the Government as to the claim of privilege on these additional questions. The Court heard these questions propounded to the witness and the answers he made thereto, and, after hearing argument of counsel for the witness and for the Government, again found that there was no real and substantial danger of incrimination for the violation of a Federal statute to the said witness, IRVING GREENBERG, and ordered him to return before the Grand Jury and answer these said questions which he had subsequently refused to answer.

And it further appearing to the Court that on the same day, IRVING GREENBERG, pursuant to the order of the Court, was again recalled as a witness before said Grand Jury, whereupon the questions that the Court subsequently ordered the witness, IRVING GREENBERG, to answer were again propounded to said witness, and he contumaciously refused to answer said questions. All of said questions that he refused to answer are as follows:

> Q. Mr. Greenberg, the question that you refused to answer was, "Do you know any number writers around there."—referring to 1133 West Diamond Street—"men who are in the numbers business?" And you answered "Yes". Then I asked you, "Who"? and you said you wanted to consult your counsel, and you have consulted with your counsel. Then you refused to answer that question, claiming your Constitutional right. The Court ordered you to answer that question. Will you answer it?
>
> A. I refuse to answer the question because my answer will incriminate me, and I stand on my Constitutional rights * * *.

Q. Now, you were asked about the telephone at 1133 West Diamond Street. You were asked, "Do you use that phone in connection with your business?" and you refused to answer that question. The Court instructed you to answer. You said before the Grand Jury, "I am ready to answer it now, sir". And I said, "Well, what is your answer?" to which you answered, "Not for my lawful business."

A. Yes, sir.

Q. And you were then asked, "Do you use it for any other business?" and you refused to answer that question, and the Court has instructed you to answer. What is your answer?

A. My answer to that question—will you repeat the question, please?

Q. Do you use it for any other business?

A. And you want my answer now?

Q. Yes.

A. My answer is, not for my lawful business. I refuse to answer that question further, because my answer further will incriminate me, and I stand on my Constitutional rights * * *.

Q. Now, when you were before the Grand Jury earlier today, I asked you a question, "The last question I asked you before you went out, Mr. Greenberg, was this: 'Is it your real estate business you use it for?'"

Talking about the telephone at 1133 West Diamond Street. You answered, "And I said, 'No.'" Then I asked you, "And what business do you use it for?" and you refused to answer it. Now, the Court has instructed you to answer that question. Do you recall that?

A. Yes, sir. The question is, what business did I use the telephone for?

Q. What business do you use it for?

A. No for my lawful business. I refuse to answer further because my answer further will incriminate me, and I stand on my Constitutional rights * * *.

And it further appearing to the Court that on the 8th day of November in the year 1950 this Court gave the said witness, IRVING GREENBERG, another opportunity to answer the said questions and he, through his counsel, stated in open court that he would not obey the Order of this Court and answer the questions which the Court directed him to answer as hereinabove set forth, thereby thwarting the investigation of the said Grand Jury and obstructing the administration of justice.

The Court, thereupon, after hearing evidence and further argument of counsel for the defendant and for the Government, finds that the said IRVING GREENBERG has willfully, deliberately and contumaciously disobeyed and resisted the lawful Order and Command of this Court by refusing to answer the aforesaid questions before the Grand Jury; and that

The said IRVING GREENBERG is guilty of a contempt of this Court by a forcible resistance to a lawful Order thereof in the manner aforesaid;

It is, therefore, ORDERED, ADJUDGED and decreed by this Court that the said IRVING GREENBERG by reason of said acts was and is GUILTY OF CONTEMPT of the authority of this Court and that the defendant, IRVING GREENBERG, be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five Months.

It is further ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal, or other qualified officer, and that the copy serve as a commitment of the defendant, IRVING GREENBERG.

/s/ J. CULLEN GANEY,
United States District Judge.

Dated Nov. 10, 1950.

[fol. 202] No. 10,336

UNITED STATES OF AMERICA

vs.

IRVING GREENBERG, Appellant

APPENDIX TO APPELLEE'S BRIEF

[Stamp:] Received & Filed Dec. 11, 1950. Ida O. Creskoff, Clerk.

No. 10,336

UNITED STATES OF AMERICA,

vs.

IRVING GREENBERG, Appellant

APPELLEE'S APPENDIX

TABLE OF CONTENTS OF APPELLEE'S APPENDIX

Excerpts from Arguments of Previous Hearings:

	Original
October 9, 1950	1a
October 20, 1950	4a
October 23, 1950	13a

Excerpts from Arguments Made on October 9, 1950
Court convened at 11:55 a. m.

The Court: Mr. Goldschein.

Mr. Goldschein: May it please Your Honor, the Grand Jury impaneled the 14th day of September has before it a witness by the name of Irving Greenberg, who was asked a number of questions, some of which he answered, others he refused to answer. Now, we would like to read the questions that Mr. Irving Greenberg refused to answer and ask Your Honor to instruct the witness that he must answer the questions. The questions referred to are these:

"Q. Do you have any other business?

"A. I refuse to answer.

"Q. I am talking about lawful business now. Do you have any other lawful business?

"A. No, sir.

"Q. Are you in the numbers business now?

"A. I refuse to answer.

"Q. Did you during the past year operate a bookmaking establishment?

"A. I refuse to answer."

That is, Your Honor, 1950. Another question which he was asked was:

"Q. Do you take bets on sports events?
"A. I refuse to answer.
"Q. And that is all you know about the numbers business, what you read in the newspaper or what somebody told you?
"A. Well, I refuse to answer that.
"Q. Do you know an address 1133 West Diamond Street?
"A. I refuse to answer that.
"Q. Do you know whether there is a tailor shop there?
"A. I refuse to answer that.
"Q. Sir?
"A. I refuse to answer that.
"Q. Is that a cleaning and pressing shop at that address?
"A. I refuse to answer.
"Q. Do you know a man by the name of L. J. Perry?
"A. I refuse to answer that.
"Q. Did you ever meet Willie Weisberg there?
"A. I refuse to answer that.
"Q. Did you ever meet Cappy Hoffman there?
"A. I refuse to answer that.
"Q. Do you drive your own automobile?
"A. Yes, sir.
"Q. What kind?
"A. I refuse to answer."

Now, may it please the Court, we can't see any reason for the witness not answering those questions. He has given no reason and I respectfully request the Court to instruct him on these matters.

Mr. Witkin: Will Your Honor indulge me just a second. May it please Your Honor, Irving Greenberg is represented by myself and Mr. Jacob Kossman, a member of the bar, who is associated with me. I merely want at this moment to inform Your Honor we were given these questions just about twenty or twenty-five minutes ago. There are certain of these questions that Mr. Goldschien has read where

after consultation with Irving Greenberg, Irving Greenberg is willing to answer. However, I say respectfully to Your Honor there are many legal questions involved in regard to these particular questions and in regard to the entire proceeding that Mr. Kossman, with Your Honor's permission, will argue in lieu of myself, he being much more familiar with the law, very frankly, more than I am.

Mr. Kossman: My first quarrel with Mr. Witkin is that I am not more familiar with the law than he is. If the Court pleases, I am making these arguments after the questions have been read by Mr. Goldschein and before the Court has ordered Mr. Greenberg to answer certain questions, and the argument goes to all these questions. * * *

Excerpts from Arguments Made on October 20, 1950

[Mr. Witkin]:

I hope that by the time I shall have finished this argument Your Honor will come to the conclusion that I have so shown that.

Then I will also quote the testimony, so that I can put it aside, I want to read what Mr. Goldschein said when he argued about the income tax possible incrimination on Page 194.

He says:

> "Well, we will paraphrase it when he goes back before the Grand Jury and limit it to 1950. That is what the intent of the question is. Now, how will questions of that sort tend to incriminate him?"

If Your Honor please, this is our case. This man, and we shall show, filed an income tax return for the year 1949, of course and the prior years. For the moment we will leave 1950 out. In that return he set forth his business, and he set forth the name of his employer, the Nemtol Apartments, and he set forth an income from that. And then on the second page where he is asked as to any other business or profession, to state it, he has the word in all of his income tax returns 'Misc.—M-i-s-c.'' Bear in mind that this man has given one business, and he has sworn to that tax return and said that the business that he is in from which he receives X dollars per year is a certain apartment house and he being an officer of that.

He answered that to the Grand Jury. Now, he cites no other business.

I don't care, may it please Your Honor, whether—and the first four questions, those telephone questions I hope Your Honor will pass out of your mind for the moment, the first four questions that you sent him back to answer dealt solely with his business, nothing to do with the telephones, because I think they are unimportant in this case, and I think Your Honor will agree with me when I shall finish.

I don't care what you assume, may it please the Court, as to what his answer might be, whether it be the number business, whether it be the butcher business, whether it be a narcotic business, he has filed, he has set forth income in large amount in his tax. But when he is asked in that paper, in the government return, what business, he doesn't give it to them. And I shall read to you——

The Court: What does miscellaneous bring to your mind? Might not this be under the head "Misc."?

Mr. Witkin: Your Honor, let me say this. You must—we must bring, as I take it, our common sense into the court room. In other words, if a man has a business, whether it be one kind of business or another, it isn't miscellaneous. In other words, you are required—suppose you filed your income tax return, instead of it being a Judge of the United States Court simply put miscellaneous so much. You know you would be filing a false return. If I put down miscellaneous so much. Here is a man who says that he miscellaneously receives so much money. Now, if he admits he is in a business, it is not miscellaneous.

You can't say to me, may it please Your Honor—I say you can't, I don't mean you can't, but I don't think properly. In other words, if I am supposed to state my business in an income tax return and I don't state my business I deliberately conceal my business and I simply put miscellaneous, and then I admit to you that I am in a business, then certainly—and I will read you the Spies case, he quotes from that—then certainly I am saying in that income tax return something that is false. You don't have to limit this to the numbers business. Suppose I put in that report I was in the numbers business and my income instead of miscellaneous was the numbers business, and when I got on the stand Mr. Goldschien asked me what business, and I knew I had lied when I said the numbers business, I was a nar-

cotic person, dealing in narcotics or white slavery, for the sake of argument, certainly the minute I answer who knows that—if Your Honor please, to open the door ajar of a person that knows that is the person that filed that return——

The Court: Suppose I worked for Budd & Company as a laborer and I made ten dollars a day, and on my income tax return I said I worked for Budd & Company and I made ten dollars a day, and then I put "other business," I put "miscellaneous," suppose I cut the grass for the neighbors around and I made four or five or ten dollars a week on that; suppose I tended furnaces on the side, and suppose all told I made twenty or thirty dollars a week doing that, wouldn't that be miscellaneous?

Mr. Witkin: No, that wouldn't be miscellaneous.

The Court: What would it be?

Mr. Witkin: You would have to give the name of your employer, you have to say from what source you derive that money, and you would have to put what work you did, and what job you did.

Now, if you are in business, let us say that is your business, and you did that, if you were a general workman, but in addition——

The Court: After working hours.

* * * * * * *

Mr. Goldschein: I want to make sure that I was right on that, because I have not read it in a long time. There is no intent. The Supreme Court said that he willfully failed to file an income tax return, and reversed the conviction.

Now Mr. Witkin says that Mr. Greenberg in setting up all his activities in the real estate business lumped it under the head of miscellaneous, and that the Court could construe that that miscellaneous is a limitation on his activities; that miscellaneous doesn't cover all his activities; that the word "miscellaneous" when he put it in that return is supposed to leave the income tax department with the idea that the word "miscellaneous" means a limited number of businesses or occupations, not all inclusive. Of course, that is ridiculous.

The word itself means no one thing in particular. If I understand the word right, it certainly means without limitation; and certainly if the tax department wants more de-

tailed information on what "miscellaneous" means they can get it from Mr. Greenberg.

He said he paid his tax, and shows Your Honor the tax that he paid on his income from the real estate business and all his other occupations, all inclusive, may it please the Court.

Now this proposition of being afraid that he may incriminate himself is purely a smoke screen. I say Mr. Witkin is doing about as much with it as he possibly can to explain the law as he is trying to fit it to the facts.

What is the numbers racket?

As I understand it there are no employees and never have been in the numbers racket. There is a banker who receives the money from the pick-up man and takes out his cut before he turns it over; then you have the numbers writers, they take out their share before they turn it over to the pick-up man. So what kind of withholding tax is there supposed to be?

Now, there was a switch that there might be an income tax violation, but the questions were limited to the year 1950, so there cannot be any income tax violation.

Then Mr. Kossman told Your Honor that Judge Maris in discussing the Camarata case took only certain questions. As a matter of fact Judge Maris listed the questions that he was basing his decision on, and they are set out categorically in the foot note, and your Honor quoted from those questions this morning.

Now, certainly the questions asked in the Camarata case go far beyond the questions asked the witness in this case in this matter before the Court this morning.

Let me dispel, if I may, some statements made by counsel this morning, I think Mr. Kossman, with reference to the special power of this Grand Jury, where there is something extra special about it.

This Grand Jury was charged regularly, there was no special or particular charge of the Court to do any one particular thing. It has the same powers all other grand juries have that have sat here before and will continue to sit.

The very fact that Greenberg was called before the Grand Jury and asked questions doesn't give him any more right than the college professor that Mr. Kossman referred to; that when they come before the Grand Jury they come with the same status, and Mr. Greenberg has no more privilege

than does the college professor, even though the newspapers are talking about the Grand Jury investigating racketeers.

And much was said by Mr. Kossman in articles that he read this morning to Your Honor about what the newspapers said the Grand Jury is doing.

I want Your Honor to know now, and I don't think the newspapers intended to quote me with reference to any income tax returns that we had in our possession of any of these defendants. I think the statement has been made by representatives of the Kefauver Committee. I believe I read some statements, and I believe that some of the representatives of Senator Kefauver's Committee did say something about having income tax returns, or will get them, something like that, but I have never at any time to anyone under any circumstances made any statement that I had any income tax returns of any of the witnesses before the Grand Jury, or that I have seen any, or that I intend to get any. That statement was never made by me, and I don't believe I was ever quoted as saying that.

• • • • • • •

Mr. Goldschein: That wasn't the spies.

Mr. Witkin: Never mind the spies. Section 1625 A, B and C, they provide for that; we have got to keep records.

The Court: I can't make the assumption that you didn't keep records either any more than——

Mr. Witkin: But the trouble is, what Your Honor wants to do, the only person that knows, unless you think the man is committing perjury—now, first of all Mr. Goldschein has been talking about the numbers business when we started out; we can't assume that his answer is the numbers business. Let us say we think it is but we can't assume it, it might be any other business. But if it is a business he has got gross and net income.

The Court: Yes.

Mr. Witkin: Must have records.

The Court: Yes, but he put "miscellaneous" down there.

Mr. Witkin: But it is not enough.

The Court: If the Government isn't satisfied they can call him in and they can go into the details of the "miscellaneous" if the miscellaneous doesn't check up with the total tax paid. There is no mystery about that.

• • • • • • •

Excerpts from Arguments Made on October 23, 1950

The Court: Any questions of Mr. Witkin?
Mr. Goldschein: Not at this time.
The Court: All right, the witness is excused.

(Witness excused.)

Mr. Goldschein: May it please the Court, I want to move to strike from his statement all matters that he refers to with reference to his business prior to 1950. He has not been asked anything with reference to any business he was in prior to the year 1950. I didn't change my position with reference to that. I clarified before the Grand Jury and in court here that the questions asked Mr. Greenberg were limited to the year 1950.

The Court: I think that is right.

Mr. Goldschein: I want to also move to strike all reference to any question about any employees that he may have, because I have not asked him any questions with reference to any employees, and we can't and this Court can't suppose that he does have any employees.

We want to move to strike with reference to any statement he made as to withholding tax because since we can not assume that he has employees we can not assume that he paid anybody any salary and that it was necessary for him to withhold any tax. Certainly any employee anyplace that earns less than $600 a year doesn't have to pay any income tax, and his employer is not required certainly to withhold any tax on his behalf; the statute limits the tax of taxpayers to anything over $600.

Now, with reference to records, Mr. Greenberg wants the Court to anticipate and presume that if he answers the questions he will disclose the fact that he has a business that involves a great many transactions, and the Court must draw upon his imagination to determine approximately how many transactions Mr. Greenberg had that required enumerating.

There are a great many businesses, and I don't know that Mr. Greenberg's business is any different from that, at least the business that he refuses to tell us about, that has any other records other than the fact that probably he pays a telephone bill of a stated amount each month, and there would be twelve which he could compile at the end of each year, and make a record for his 1950 income tax which will be due in the year 1951, or that he pays rent of a certain

stipulated amount which he could add up and enter into the book by the end of the year.

Certainly, as the Court asked Mr. Witkin and suggested to him that Mr. Greenberg certainly couldn't be prosecuted for the failure to keep records during the year 1950 until after the 1950 taxes are due and his return filed.

Now, we don't know that in this particular business that Mr. Greenberg—this other business that he refuses to answer about, the unlawful business, if he is in one, earned him any particular income that he need keep any records about. What Mr. Witkin is asking the Court to assume is firstly that if he answers he will answer in the affirmative, and if he answers he is in an illegal business, that it was an active and large business that required the keeping of records, and since it is a large business he must have had several employees to conduct this business; and the Court in addition to that must also assume that these employees earned more than $600 a year.

Now, all of this the Court must draw upon its imagination in order to determine the issue that Mr. Witkin wants the Court to predicate its opinion on.

Now, we insist, may it please the Court, that the particular question or questions that have been submitted to Mr. Greenberg by this Grand Jury will show no direct tendency to incriminate.

He has taken the witness stand, and his answers on the witness stand have shed absolutely no light on the direct tendency to incriminate.

We would like to go over this statement when the Court recesses and make our further objection to the particular statement set out here, and probably ask Mr. Greenberg some questions thereon.

Mr. Witkin: I can't possibly come back, if Your Honor please, I hate to tell you the circumstances under which I am here; I mean I just can't come back.

The Court: Could Mr. Kossman be here, or do you want to be here?

Mr. Witkin: I want to be here. I am perfectly willing to stay——

The Court: We will recess with respect to him to tomorrow morning. Any objection to that?

Mr. Goldschein: No.

Mr. Witkin: I hope I can be back tomorrow morning.

Your Honor has not ruled on Mr. Goldschein's motion to strike, have you?

The Court: No, I will hold it all off. I think the first part is obvious, that there have been no questions asked with respect to the year previous to 1950, I think that can go out.

Mr. Witkin: The only answer I would have to that, may it please Your Honor, if Your Honor wants to hear it at this time—is that that would be a link in following it up. In other words, the next question could be "When did you establish that business? How long have you been in that business?" could very easily go back past 1950.

The Court: I am going to grant the motion to strike. He has concerned himself solely with the year 1950. I don't see any reason now for answering about 1949, 1948; there it involves another different question. He has filed a return, that involves a much more serious question than here.

Mr. Witkin: Will Your Honor grant me an exception to Your Honor's ruling? In other words, has Your Honor now ruled just on the years prior to 1950?

The Court: That is right; the relevancy depends on the year 1950.

Mr. Goldschein: We will close now, we won't ask Mr. Greenberg any questions and there won't be the necessity of continuing this hearing until tomorrow morning.

Mr. Witkin: That is satisfactory.

The Court: All right. Is there any other matter now that you have before the Court, Mr. Attorney General?

Mr. Goldschein: Other than the Stromberg matter, no, sir.

Mr. Witkin: I take it that Your Honor has not yet—if Your Honor grants Mr. Goldschein's motion to strike the balance Your Honor will notify us, or have you abandoned the motion to strike?

Mr. Goldschein: No.

Mr. Witkin: In other words, Your Honor has not yet ruled on the motion to strike. If your Honor grants the motion will Your Honor grant us an exception; and if Your Honor doesn't grant the motion Your Honor won't, and Your Honor will have us informed as to whether or not you grant the motion?

The Court: Yes. Court will recess. We will let the Stromberg matter go until two o'clock.

(Court recessed.)

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 10,336.

UNITED STATES OF AMERICA

v.

IRVING GREENBERG,

Appellant.

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania.

Appellant's Additional Appendix.

MORTON WITKIN,
911 Finance Building,
Philadelphia 2, Pa.,

JACOB KOSSMAN,
510 Commercial Trust Building,
Philadelphia 2, Pa.,
Attorneys for Appellant.

International, 236 Chestnut St., Phila. 6, Pa.

TABLE OF CONTENTS OF APPELLANT'S ADDITIONAL APPENDIX.

	Page
Excerpts from Hearing of October 9, 1950	203a
Excerpts from Hearing of October 20, 1950	204a
Excerpts from Hearing of October 30, 1950	218a

APPELLANT'S ADDITIONAL APPENDIX.

Excerpts from Hearing of October 9, 1950.

[211] THE COURT: Well, they are witnesses, but it may well be that they may be potential defendants eventually.

MR. GOLDSCHEIN: But we can not——

THE COURT: No, if you are going to go into the realm of assumption——

MR. GOLDSCHEIN: Well, that is what they are claiming privilege on, I understand—there may be a tendency to incriminate them.

THE COURT: All right, I think we understand each other enough about the question of relevancy.

[212] MR. GOLDSCHEIN: All right, sir.

THE COURT: Do you want to be heard further, any of you?

MR. WITKIN: May it please Your Honor, I would like to answer Mr. Goldschein. He says, "Now we will change the question making it during the past year," and I would also like to tell him specifically for the moment that the section I refer to is Section 145 of the Internal Revenue Code (a), (b), and (c), and particularly (c). Now let us assume—and I am only going to take two minutes of your time—let us assume Mr. Goldschein amends the question to this year, 1950. His argument is absolutely ridiculous, if I may say so respectfully, for this reason, that if from the first of January, 1950, up until the present time, I were in the numbers business, and had employees, and kept no records, did not pay withholding tax, and the withholding

tax due my employees, did not pay Social Security, did not pay Unemployment Compensation, unless I turn around now and make false records from the first of January, 1950, up until today, October 9, or whatever date it happens to be, I am in exactly the same position. Acts generally mark the man.

Because he says he doesn't know what section—the section is the attempt to conceal, and Your Honor will hear much more about that, if I may say so, from Mr. McBride, who [213] just finished arguing a case in the Circuit Court of Appeals in which the Court held that the failure to keep records was an offense and conviction was sustained, I believe, on the attempted concealment, so if Mr. Greenberg is compelled to say he is a bookmaker and in business this year, then if he did not keep records, and did not pay withholding tax, and did not pay those things, he is then admitting the commission of a federal offense for which he can be indicted.

I may to Mr. Goldschein—and I am through—if his answer is right—you speak of the criterion—if the answer to the question, "Are you in the numbers business?" a violation of the state offense is "Yes", he has admitted a link in the chain of possibility or probability of commission of a federal crime. And he wants that question answered in order to prove a federal crime. Then he has practically admitted before this Court that we have the right to refuse to answer on the ground that it will tend to incriminate us.

• • •

Excerpts from Hearing of October 20, 1950.

• • •

[427] The failure to withhold the tax, the failure to withhold Social Security payments, the failure to withhold unemployment compensation payments, the failure to keep

records, the failure to have records, the failure to say to the Government, "My gross income was such and my net income was such, and therefore the balance is such." My gross expenses are such and the net income is such.

[428] For 1950, we are compelled to answer the question we are in business. Now, I know Your Honor isn't going to say that when I admit that I am in business that I am not almost necessarily follows, and yet if I am in business and if I employ people—let us say that Greenberg has to admit he is in business, whether that be of a running a drug store or the numbers business or anything else and that since January 1, 1950, he has kept no records and paid no withholding tax and paid no Social Security tax. My heavens, may it please Your Honor, that man is putting his neck in the noose because the minute he answers the question he is incriminating himself by saying, "I have got to do one of two things now, either go back and make phony records and avoid going to jail and trying to palm them off on the Government or I violated Section (a), (b) and (c) of 1626 and Section (a) of 1625, and furthermore, I violated the law that was handed down in the United States v. Spies. I violated Section 145 (a), (b) and (c)", so that I say to Your Honor that where a man is in a business absolutely, regardless of the type of business, and I don't want Your Honor to assume he is in any business, the presumption may be clear.

I say this to Your Honor in addition. I have been practicing at the bar for thirty-one years. In my judgment as a member of the bar I have spoken to Mr. Greenberg. [429] I have examined his income tax returns. I have gone into the facts of his case. I know his business. I know whom he had and whom he didn't have and I know what he should have done. I know what he didn't do, and I stand before this Court as an officer of the court and I say that I have said to Mr. Greenberg, "If you answer those questions there isn't any doubt at all in my mind that you

will leave yourself open to violation and prosecution of the federal criminal statutes."

Now, if a man in America can't go to a lawyer on a case that is as clear as this one and get advice and he can't rely upon that advice, if the advice is correct, and the reason I am giving the advice is because I have seen these which I would like to hand up to Your Honor. I will just hand them up so that Your Honor can look at it. It is on the second page——

THE COURT: This is for 1949?

MR. WITKIN: That is right.

THE COURT: How do I know in 1950 he may not be in this business? He may be in something else. I don't know. Just because in 1946, 1947, 1948 and 1949 he has filed a return saying he was managing apartment houses or——

MR. WITKIN: There are two answers to that.

THE COURT: You want me to make the assumption that he is still in the real estate business and will still file [430] a return for this year that he was in the real estate business and that he was——

MR. WITKIN: There are two answers to that. One, he has filed an estimated tax return. The estimated tax return that he has filed, we have a perfect right to assume that if he says that he is in some other business——

THE COURT: What did he say in his estimated return?

MR. WITKIN: Frankly, you don't state your business in your estimated return. You state your probable income. Suppose that is false, and the only person that knows that is he, I say to Your Honor nobody in this whole wide world would ever be able to refuse——

THE COURT: He can make that adjustment on his amended return.

MR. WITKIN: Assuming for the sake of argument that he can, but suppose in that return—suppose the man up until now, and I am going to make it as clear as I can, has been engaged in a business that is unlawful or lawful up until now, and he says to you, and I say to you as an officer of this court that he isn't complying with the withholding tax provision, he can be accused of aiding and abetting others to cheat and defraud the United States Government, because not having withheld the tax he is guilty of a violation of the [431] income tax laws. He has to admit he is in business, and he is the only person in the world, unless you say he is committing perjury, he is the only person in the world who knows that he didn't pay withholding tax for 1950 and he didn't pay Social Security tax, and he is the only person who knows that he didn't pay unemployment compensation tax and he has to admit he is in business.

Now, if he is in business and he didn't do that he is guilty now. He won't be guilty in March, he is guilty at this moment. The Government could go out and get witnesses as to the fact that Irving Greenberg was in business of any kind or character and send him to prison for violation of the Sections 1625 (a) and 1626 (a), (b) and (c), or of this Spies case, which says, "The handling of one's affairs and the failure to make record", and then Mr. Goldschein would say to him, "Where are your records?"

He has got no records. He is in business. He has admitted it. He is then guilty there in 1949. I agree with Your Honor. I don't argue with you. The only thing Mr. Goldschein apparently agrees with me, Your Honor, but there is no difference.

If this were the first of January and we were confronted with this there might be some possible scintilla of merit, but the minute we get up we get up on that witness stand [432] now, may it please Your Honor, without having kept a record from January 1 to October 1950, without

having paid or withheld any tax from anybody who may have worked for us, without having deducted any social security, and we are obliged to say we are in business, unless you assume that a man can be in business by himself and not have any gross income or net income, but we all know that in business we have a gross income and we have gross expenses, and this Spies case, which is a very recent case, says the failure to keep records makes us guilty.

THE COURT: You mean he would take the stand and say he has kept no record and has paid no Social Security tax?

• • •

[437] In the Camarata case, without knowing the law about it, except what I have heard here, there isn't one thing, the answer to which would incriminate him on 1625 (a), 1626 (a), (b) or (c), 145 (a), (b) or (c). And you can take every question, and you can repeat them, and you still won't find the answer to this question is, "are you in a business?"

Now, before we pass——

MR. KOSSMAN: Could I say something? This will only take a few minutes.

MR. WITKIN: Well, as we say in the Legislature, shall I yield?

MR. KOSSMAN: In the first place, Judge Maris [438] didn't ask any questions; it was the Circuit Court. He found that the District Court Judge had held that the direct answer could not tend to incriminate him.

THE COURT: No, the United States Attorney asked the questions; certainly Judge Maris didn't.

MR. KOSSMAN: I have the record, the actual record of the Camarata case, and it is most important. Your Honor can't make snap judgments just based on a sentence or two pulled out of the Circuit Court; you have to go back to the record of the Camarata case. I have got the entire record, every question. And in the Camarata case, where Camarata was subpoenaed, he was only subpoenaed as one witness. They didn't have four hundred different witnesses, and newspapers blasting and talking about investigating rackets.

Now, Your Honor said that you don't read the newspapers, and you don't even know a racket investigation is going on. Well, then, you are the only man in Philadelphia. Mr. Greenberg knows there is a racket investigation going on.

THE COURT: I didn't say that; I said I don't read the details of it, I don't read the articles. I hear it at first hand; why should I depend upon reading it in the newspapers?

MR. KOSSMAN: Now, in the Camarata case, the [439] Court asked the District Attorney—the Court was greatly concerned even on that—and Camarata was dead wrong, as far as the record is concerned, and that is a perfect decision on that particular case. The type of questions that were asked Camarata weren't the type of questions that were designed to trap him into a prosecution against him later on. This was a case involving Nuckie Johnson, if Your Honor please, and later on it developed those things. And, as a matter of fact, if you read all the cases, you will find out that these little—I can't understand Your Honor. Mr. Goldschein is one of the smartest prosecutors in the world. When he asks a question, do you think he asks an immaterial question? He is laying the groundwork so that later on he will show that when Greenberg testifies that he was around the place, not as a patron; he must have been the

proprietor. When he asked him the question "Do you use the phone?" what do you think he is asking him the question for? Because he has got stock in the Bell Telephone Company? It is because later on he wants to show he must have been the proprietor.

THE COURT: Let me ask you why he asked the question "Did you sell wire service to horse rooms?" Do you think he was doing that with a philanthropic motive? Don't you think he was asking whether he sold service to horse rooms [440] because he got paid for it?

• • •

[441] MR. WITKIN: May it please Your Honor, in concluding the argument, I wish Your Honor would bear in mind—and I only repeat it for a moment—my answer to Your Honor in the questions propounded to Mr. Greenberg as compared with those propounded in the Camarata case, to wit, that there were no questions there that directly involved the witness, or the defendant, in the admission of the failure to properly give all the information necessary to the government, and there was nothing in any of the questions propounded in the Camarata case, the answer to which could possibly involve the witness [442] in violation of Sections 1625 (a), 1626 (a), (b) or (c), or Section 145 (a), (b) and (c) of the Internal Revenue Code. Therefore, if we have a proper fear of that by reason of the general answer to these questions, regardless of the questions in the Camarata case, I say, repeating again, we push the door wide open.

• • •

[452] THE COURT: I say that on its face shows that he did not list any other business, the numbers business. Now he is willing to take the stand for the year 1950, as I understand his counsel, and say that he is in reasonable, has

reasonable apprehension, feeling he is put in danger [453] because of the fact that he may be violating 1625, 1626 A and B.

Now my particular question is does that persuade the Court that he has a reasonable ground to apprehend danger?

MR. GOLDSCHEIN: No; it didn't in the Camarata case.

THE COURT: That question wasn't raised in the Camarata case.

• • •

[456] THE COURT: I can't take knowledge anywhere. To be very frank with you I know nothing about it, that is an addiction which I have not as yet acquired. I know nothing about the numbers business. I don't know that. I don't know whether there are employees or whether there aren't. I really thought there were if I were to give a guess; I don't know how they are paid.

MR. GOLDSCHEIN: They are not paid.

MR. WITKIN: That is not so, Mr. Goldschein.

MR. GOLDSCHEIN: Maybe Mr. Witkin knows more about it than I do. I just know about it from what I hear witnesses testify to.

• • •

[461] THE COURT: I don't. I want to extend that constitutional privilege as far as I can. I don't think that ought to be in anywise pressed on anyone, but I do think it ought to be only claimed in the proper atmosphere and under proper circumstances.

I think the more I think of it I think that he should—he has a step further to go. I think he should say whether or not he has employees. I don't think that would tend to incriminate him. I think if he has employees then the possibility obtains that he might be violative of this.

Then I am not, I don't want to prejudge this at all, but I certainly think that there is reasonable ground that

a court might be persuaded that there was reasonable ground for the apprehension of danger.

MR. WITKIN: In other words does he have to say in what business he had employees?

THE COURT: I don't think he has to say that. If he says—I don't want to pose the question, you have far greater competency than I in saying what will be asked, and I might usurp the province of the Attorney General, I don't know, I don't want to say to you how far you can go any more than how many times the Supreme Court has been asked to define due process.

[462] MR. WITKIN: Here is the situation I find myself in, and I am frank to say it. I find myself in the position where apparently what Mr. Goldschein—and I want to answer his argument, and I will do that after recess—what Mr. Goldschein and what the Court has indicated is that this man would have to go on the stand, practically admit——

[463] THE COURT: Oh, no, he doesn't. He doesn't have to admit anything. When he goes on the stand and says, "I have employees——"

MR. WITKIN: Instead of saying, "I have employees" if he says, and I have it here. I have a prepared statement for him which I would like to read to Your Honor to show what he is going to say. I have it written out. I have corrected it within the last few moments.

He gets on the stand. He says, "If Your Honor please, the reason I have refused to answer this question is this. I know if I answer that I will incriminate myself."

He doesn't say, "I might."

"I will incriminate myself in violation for the year of 1950."

THE COURT: He has got to show reasonable ground that the Court is persuaded that he is in danger of incriminating himself.

MR. WITKIN: How can he do that without telling the facts? In other words, in every case where a man stands on his Constitutional rights does he have to give the facts incriminating him? In other words, does he have to say, "I am in the narcotic business," in order to take advantage of the fact that he might incriminate himself? If he is in the numbers business——

[464] THE COURT: If he is in the automobile business and he has no employees he has not violated any particular statute. The answer wouldn't incriminate him.

MR. WITKIN: Doesn't he violate it when he says, "I have a gross income"?

THE COURT: That I don't know. Mr. Goldschein says——

MR. WITKIN: Take the numbers business for the moment. In any business he would have a gross and net income.

THE COURT: He says he is in a lawful business.

MR. WITKIN: He never said "I am in a lawful business."

THE COURT: He said, "I have another lawful business."

MR. WITKIN: He said, "I have another lawful business."

THE COURT: What is the inference from that or the direct implication if he has another lawful business——

MR. WITKIN: When we refuse to answer on the ground that it will tend to incriminate him we are there indicating that he is not in the drug store business or the automobile business. There is no question about that.

Mr. Kossman started out with that argument and you said, "Don't assume it."

[465] I can't assume he is in the numbers business nor can you assume it just because Mr. Goldschein says he assumes it.

THE COURT: If you were in the restaurant business and you put in there "Miscellaneous," as he does here, and he was in the automobile business, I would require him to say, if he used "Miscellaneous," and he wanted to claim the privilege which you assert here on his behalf, he would say that he had certain employees in the automobile business.

MR. WITKIN: No, Mr. Goldschein says to him, "What employees do you have?"

THE COURT: I don't know what Mr. Goldschein is going to say, if he does. You have the right to enter an objection and the Court will rule on it.

MR. WITKIN: May I say respectfully to Your Honor this? Here is the position I find myself in. In other words, for the sake of argument let us say he goes back and he says, "Yes, I employed people during the year 1950."

Now, then, he is cross-examined and Mr. Goldschein says, "Who do you employ?"

I say, "Objected to."

Your Honor says, "Objection overruled. Answer the question."

We are in contempt right here and now if he says, [466] "I can't answer it," because I could argue my head off to you and then say to you, "If Your Honor pleases, if the answer is that he is going to incriminate himself," and you say, "Well, I have directed him to answer."

I don't have to wait for a proceeding in contempt because I am on trial and you have ruled. I don't think that is fair. I don't think Your Honor wants to be unfair and I say with all seriousness I am hurt.

THE COURT: When he says, "I have employees?"

MR. WITKIN: Then Mr. Goldschein asks him to give him the names of witnesses who can come in and testify

against him. In other words, he says, "I employ Morton Witkin."

THE COURT: When he says he has employees——

MR. WITKIN: Then he says, "Who are they?"

Mr. Goldschein asks him, "Who are they?" And I would object to his answering on the ground that it will incriminate him and Your Honor says that he has to answer. If he doesn't answer he is in the jug.

THE COURT: Unless he is telling the truth. If he has employees certainly I would think—I will not say now in advance—I don't want to rule—if he says he has employees and then Mr. Goldschein has got the right to say, "Who are they?"

I don't want to attempt to define the limit of [467] Mr. Goldschein's authority, but if he says he has employees I think it possible the Court will give consideration——

MR. WITKIN: There is just one thing. If his answer is yes and he names the employees you are making us name witnesses who will testify against us.

THE COURT: I don't know.

MR. WITKIN: Because he says, "If I answer that question I might incriminate myself."

THE COURT: He said it all along.

MR. WITKIN: He is saying it now for the year 1950 that he might incriminate himself.

THE COURT: That doesn't say that he is incriminating himself. It just says that he has employees. When he says he has employees he isn't helping to incriminate himself any further just because he names the employees. If the Government sees fit they can go out and determine whether or not he is accurate.

MR. KOSSMAN: I think Your Honor is starting with the wrong legal premise and therefore you arrive at the wrong legal conclusion. Here is the right legal premise. Mr. Goldschein has given you the wrong legal premise

when he cites the Mason case. The right legal premise is this, decided last year.

"It is reasonable construction to think that the [468] witness is protected from being compelled to disclose the circumstances of his funds, the sources from which or the means by which evidence of its commission or of his connection with it may be obtained."

You are asking the man to convict himself in direct violation of the law. What is his constitutional privilege worth? According to what Mr. Goldschein demands he might as well tear up the Fifth Amendment.

MR. WITKIN: I wish to say to Your Honor this in conclusion. Employees isn't the sole question. It is also the question of records.

THE COURT: You say he hasn't got any records?

MR. WITKIN: Yes, I will have him say he has kept no records of the business that he is in without disclosing the business. I will say he has kept no records. He has kept records of this apartment business, but other than that he has kept no records. In other words, I will have him say that he has kept no records of his miscellaneous business, and I don't want Mr. Goldschein to say, "What business is he in?" I realize I may be in contempt in front of you now. If Your Honor is wrong on the law, I think I can win it if Your Honor rules against me. I may be wrong. I have lost before and I will probably lose again, but I know one thing, that when he gets on the witness stand and I don't obey Your Honor's ruling and [469] I tell him not to answer, then he is in contempt. All you have to do is say he is in contempt.

THE COURT: No, I would permit the withdrawal of it because you aren't in the contempt proceeding. You would then go back to the original basic question which hasn't been answered.

MR. WITKIN: If Your Honor will permit me to withdraw, that is fair.

MR. GOLDSCHEIN: If Your Honor please, I think Mr. Witkin has gone far afield from the question at bar. I don't recall that the witness has been asked any questions as to how many employees he has and whether he has any employees. The first question for him to answer is what business he is in and the other questions that are set out here that he refuses to answer. Then if it develops we will go to the others.

The only requirement here that this Court must ask him is, to answer the question whether or not he is in the numbers business. If the answer is in the affirmative and he is asked whether or not he has any employees and he claims his privilege that the answer might tend to incriminate him for violation of the Internal Revenue statutes and he states that on the witness stand at that time, then we will come to that when we see it, but he must first say yes to that question. He must first answer this question, "Are you in the numbers business now?" will incriminate him. That is the first question.

[470] THE COURT: Just a minute. He says, "No." Let us take this orderly.

He says, "I refuse to answer." He puts his witness on the stand. He is asked the question and he says, "I refuse to answer because of the fact"—I will go through it quickly—"because of the fact I filed an income tax return. I am now offering this income tax return to the Court for these other years. During those years I have had only one business which I have named outright and the balance was miscellaneous, that for the year 1950 I have the same business. I am in the real estate business. I say to Your Honor that I have certain employees, that I have kept no books or records with respect to any other business except my real estate business. If I answer I am in any other business I have reasonable ground for the apprehension of danger."

I am not so sure of that.

MR. GOLDSCHEIN: Not on what he says here. Must Your Honor assume that there was a profit in this other business? Is Your Honor going to guess at that?

THE COURT: The profit angle doesn't enter into it. If he hasn't kept books or records profits don't enter into that.

• • •

Excerpts from Hearing of October 30, 1950.

[603] MR. WITKIN: And it would be superfluous for me to make it. The reason is the same I gave you before. For example, he was asked did he know any writers around there in the numbers business. The answer was, "Yes." As soon as he is asked, "Who?" he may incriminate himself, because they may be his employees. They may be—I don't say they are—people he was in a business with. He may be involving himself in a conspiracy. I mean I could go on almost ad infinitum, as to why he can't give the names, because the names would be those people with whom he would be associated, and all [604] the arguments that I have made before Your Honor previously, as well as the arguments I give you now, would seem to me to apply. It seems to me that when he answered the questions he complied with the order of the Court there, and when we are asked now, "Who?" it is getting to the point where absolutely any possible rights we have against self-incrimination would be voided, because the minute he starts giving names of persons whom he knows, he would be giving, perhaps, the name of a man who worked for him, he might be giving the name of a man who would possibly be a witness against him. I mean there are so many arguments that I could make on that, that every one of them could incriminate us, and for that reason we advised Mr. Greenberg that the answer to that question would tend to incriminate him.

THE COURT: I don't see here where there is any direct tendency to incriminate him. It may involve number writers, but I won't bridge that gap. I am directing him to answer who they are.

MR. WITKIN: Your Honor will grant me an exception?

THE COURT: Yes.

MR. KOSSMAN: I would like to supplement Mr. Witkin's argument by saying that the context shows he has refused to state that it was a lawful business. Now, to identify people who are around there by names would certainly [605] be serving—and all the cases hold—it would be giving a list of possible witnesses as to what his unlawful business was, to the prosecution.

THE COURT: Well, the question just is, does he know them. He doesn't say that he is associated with them.

MR. KOSSMAN: He has answered the question that he knows them.

THE COURT: Well, who are they? Just his saying who they are, whether their names are John Smith or Bill Brown, they may be in the counterfeiting business or any other business, but that doesn't say that his knowing them incriminates him. I know a lot of people I see brought in here before me who are counterfeiters, and just because I say I know them doesn't says that I am engaged in an unlawful business. He has to go a step further.

MR. KOSSMAN: The man has stated that he is engaged in an unlawful business. The man has stated that.

MR. WITKIN: No, he hasn't.

MR. KOSSMAN: Oh, yes.

MR. WITKIN: You are wrong there.

MR. KOSSMAN: The man has said he is not engaged in a lawful business. So the inference is that he is therefore engaged in an unlawful business. Now, for him to state

the people around there would be giving the Government possible witnesses to aid in prosecuting him. And, now, he doesn't [606] have to give a direct answer. It is a link that might serve as a source of prosecution.

THE COURT: Well, a link, but, as I say, suppose you asked me, "Do you know a counterfeiter?" Now, he doesn't say——

MR. WITKIN: I don't want to——

THE COURT: There are a few steps in here that he can go, it seems to me. When he is asked a question as to whether certain people are there, and the next question is, "Who are those people?" Or, "What are their names?" it may offend a certain sense of what has been described as fair play or cricket, or something else, but as a legal right to claim self-incrimination——

MR. KOSSMAN: If the Court pleases, I just wanted to make one argument, by analogy. If, for example, a man was running a disorderly house, and there were women in there, and he was asked, "What are the names of those women?" you could clearly see that giving the name of the woman would give the Government an opportunity to get possible witnesses against him.

THE COURT: My answer to that is, that that would not give him any right to claim self-incrimination; that is a State offense.

MR. KOSSMAN: I am talking about if there was a federal offense involved, such as the Mann Act.

[607] THE COURT: Whether or not he is in the numbers business gives him no right here, in a federal court. If he were in a disorderly house business, he would have no right to claim that in a federal court.

MR. WITKIN: I hate to be repetitious, because Your Honor has been so patient, but here is the answer. Here, the answer is dealing with a federal offense. If he names A, B, or C, for the sake of argument, and if, for the sake of

argument, he knows, and I know, for the sake of argument, that A, B, and C, were employed by him, and, getting back to the Social Socurity, the withholding tax, and the unemployment compensation tax—incidentally about which I am going to be able, at the proper time, to give Your Honor the answer to the questions to wit, the regulations that provide and make it a criminal offense at certain stated times which will have already passed, with regard to the time which you have to pay that—and I would like Your Honor to bear that in mind, because when the time comes, I will give you those regulations. Now, if, with regard to A, B, and C, if they are his employees, and if they should have had their Social Security withheld, and paid at a certain time during the year 1950, and A, B, and C, are the only persons in the world that know that, other than his counsel——

• • •

No. 10,336

UNITED STATES OF AMERICA

vs.

IRVING GREENBERG, Appellant

Proceedings in the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS, FOR THE THIRD CIRCUIT

No. 10,336

UNITED STATES OF AMERICA

v.

IRVING GREENBERG, Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued January 4, 1951

Before BIGGS, Chief Judge, and MARIS and HASTIE, Circuit Judges.

OPINION OF THE COURT—Filed February 8, 1951

By MARIS, Circuit Judge.

This is an appeal from a judgment of the United States District Court for the Eastern District of Pennsylvania finding the appellant, Irving Greenberg, guilty of criminal contempt of court.

It appears that the appellant had been subpoenaed as a witness before the grand jury which was investigating the violation of various federal laws. He had answered many of the questions propounded to him but certain of them he declined to answer upon the ground that his answers thereto might tend to incriminate him of a federal crime. The appellant was then brought before the district court where his claim of privilege was challenged by the Government. The court, after hearing, found that there was no real or substantial danger of such incrimination and ordered the appellant to return and answer the questions before the grand jury. The appellant reappeared

before the grand jury as directed but again refused to answer some of the questions upon the same ground.

Thereafter the grand jury filed in the district court a presentment against the appellant charging him with criminal contempt. The presentment charged that the appellant (a) had given obstructive and contumacious answers to the questions propounded to him before the grand jury and had thereby willfully, deliberately and contumaciously shut off and blocked the search for truth, thwarted the investigation of the grand jury and obstructed the administration of justice; and (b) had willfully, contumaciously and deliberately disobeyed and resisted the lawful order and command of the court by willfully and deliberately refusing to obey the order of the court to answer before the grand jury the questions in controversy. Charge (a) involved a violation of clause (1) of Sec. 401 of title 18, United States Code, and charge (b) involved a violation of clause (3) of that section.[1] After a trial upon the presentment the district court found the appellant guilty of criminal contempt and sentenced him to undergo imprisonment of five months.

The questions which the appellant refused to answer and which were the subject of the presentment against him fall into three groups. The first is represented by the question "Are you in the numbers business now?" The second followed an affirmative answer by the appellant to the question "Do you know any numbers writers around there [referring to 1133 West Diamond Street, Philadelphia], men who are in the numbers business?" The next question, which appellant refused to answer, was "Who?" The final group of questions involved the appellant's admitted use of a telephone at 1133 West Diamond Street.

---

[1] "§401. Power of court

"A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The appellant had been asked "Do you use that phone in connection with your business?" and he had answered: "Not for my lawful business." He was then asked the questions: "Do you use it for any other business?" "And what business do you use it for?" He refused to answer these two questions. In each case his refusal to answer was, as we have stated, based upon his assertion that the answer would tend to incriminate him of a federal offense.

In the argument before this court the alleged incriminatory nature of an affirmative answer to the first question "Are you in the numbers business now?" was discussed at length. However, it appears from the record that this problem is not before us since the district court based the finding of contempt solely upon the appellant's refusal to answer the second and third groups of questions above mentioned and did not find that the appellant's refusal to answer this first question was a contempt of the court's order. We, therefore, do not here consider its alleged incriminatory character.

Moreover, the district court found the defendant guilty of criminal contempt only in that he had disobeyed the lawful orders and commands of the court, a violation of Sec. 401(3) of title 18, United States Code. It did not find him guilty of the charge made in the presentment that he had willfully, deliberately and contumaciously shut off and blocked the grand jury's investigation by his refusal to answer its questions, thereby obstructing the administration of justice, misbehavior which would be a violation of Sec. 401(1) of title 18, United States Code. Accordingly we do not have to consider whether the appellant, in claiming his constitutional privilege under advice of counsel, as he did, could be convicted of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury. Certainly the assertion of a constitutional right if made in good faith on advice of counsel could hardly be described as such misbehavior.

Since the appellant admitted at his trial that he had disobeyed the order of the district court by refusing to answer before the grand jury the questions which the court had ordered him to answer and since his conviction of criminal contempt was based solely upon the finding that he had disobeyed a lawful order of the court, the

only question properly before us on this appeal is whether the order of the district court to answer the second and third groups of questions was lawful. This turns upon whether or not the court was right in overruling the appellant's claim of privilege against self incrimination with respect to these questions. It does not depend, as the appellant asserts, upon whether the questions were relevant, competent or material to the grand jury's inquiry, for this was of no concern to him as a witness before that body. Nor does it depend upon whether or not the witness was himself under investigation by the grand jury. Blair v. United States, 1919, 250 U.S. 273. For he is entitled to assert his constitutional privilege against self incrimination regardless of that fact and in doing so was not, as we shall point out later, required to prove that the grand jury or the government actually had incriminating evidence against him. We turn then to the question properly before us.

In Camarota v. United States, 3 Cir. 1940, 111 F. 2d 243, cert. den. 311 U. S. 651, and very recently, with respect to questions asked a witness before this same grand jury, in United States v. Hoffman, 3 Cir. 1950, F. 2d , this court has had occasion to consider the extent of the privilege against self incrimination under the Fifth Amendment. We have followed Chief Justice Marshall's enunciation of the test in U.S. v. Burr (In re Willie), Fed. Case No. 14,692e, p. 40, that: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be."

If, however, a direct answer to the question cannot under the particular circumstances of the case upon any reasonable theory disclose a fact which is, in the words of Chief Justice Marshall, "a necessary and essential part of a crime"[2] the question must be answered. To support the claim of privilege the danger must be real, not remote or fanciful. It must appear that the answer to the question may disclose a fact which will supply a link in the

[2] U. S. v. Burr (In re Willie), Fed. Case No. 14,692e, p. 40.

chain of evidence which is necessary to establish the commission of a crime by the witness. Mason v. United States, 1917, 244 U.S. 362. It is not enough that answers to anticipated later questions might do so. Camarota v. United States, 3 Cir. 1940, 111 F. 2d 243, cert. den. 311 U. S. 651. Applying this rule the district court considered the questions here involved and decided that direct answers to them could not incriminate the appellant of any federal crime. We are satisfied that the court was right in so holding with respect to each of the two groups of questions in controversy on this appeal.

We take up first the group of questions relating to the use of the telephone at 1133 West Diamond Street, Philadelphia. The appellant had stated in reply to previous questions that he had regularly used that telephone but that he had not used it for his lawful business. He declined, however, to answer questions as to whether he used it for any other business and, if so, for what business, claiming that to answer would incriminate him:

It must be conceded that some possible answers to a question as to a witness' business may be incriminating under the federal law. The witness may be by occupation an illicit dealer in narcotics, an illicit distiller or a counterfeiter. However, as this court pointed out in United States v. Hoffman, supra, "the question . . . is so frequently asked of witnesses as a mere identifying question that without more a court may well regard it as normally too innocent to fall within the Marshall principle." Accordingly the witness "must show the court enough beyond his bare statement of crimination at least to indicate that this claim was not clearly groundless, a contumacious assertion made in bad faith."

It is not necessary, of course, for the witness to prove that his answer would actually be incriminating, for to do so would be to lose the privilege in establishing it. Accordingly he need not prove that the government has in its possession or that the grand jury has secured from him or from other witnesses evidence which, when the answer to the question under attack is added, will be sufficient to complete the chain of evidence needed to convict him of federal crime. Here, as we shall see, the court was justified in concluding that a direct answer could not reasonably form a link in that chain. Accordingly the court

did not err in refusing appellant access to the grand jury minutes and to the files of the government.[3] Where, as here, the question was innocent on its face all that the appellant was required to do was to satisfy the court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of a federal crime if a fact which might be disclosed by a direct answer to the controverted question were added to them.

In United States v. Hoffman, supra, the appellant sought, belatedly as we held, to meet this burden by allegations with respect to his reputation as a racketeer and notorious underworld figure and by references to newspaper articles which tended to support this reputation both generally and by specific allegation of prior conviction under the federal narcotics laws. We held that this would have been sufficient, if it had been offered in time, to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy. In the present case, however, the appellant made no such showing. He did not offer any reasonable basis for inferring that the nature of his business, as distinguished from the fact that he was in a business of some kind, might be a fact which, with other facts, would incriminate him of a violation of the federal law. We need not consider the clear inference that the disclosure of the nature of his business might convict him of a violation of state law. For, as we pointed out in Camarota v. United States, supra, the privilege against self incrimination given by the Fifth Amendment extends only to violations of the federal laws.

The theory which the appellant advanced in support of his claim was that if he should state the business in which he used the telephone the next questions asked him would be whether he had derived income from that business,

---

[3] We, of course, do not decide whether these contentions of the appellant would have been meritorious in connection with the charge contained in the presentment that he had contumaciously obstructed the administration of justice by blocking the inquiry being made by the grand jury, since the district court did not, as we have pointed out, convict him on this charge. That question may well involve other considerations.

whether he had employees in that business, and whether he kept records of that business. His answers to these questions, he asserts, might tend to incriminate him of criminal violations of the internal revenue laws relating to the income tax and the withholding of income and social security taxes from employees' wages. We do not have to decide, however, whether the defendant may cla-m his privilege with respect to these questions for they have not been asked. What we have to decide is merely whether a witness may decline to state his business, although itself not unlawful under the federal law, upon the theory that he may have violated some federal law in the course of the conduct of that business and that subsequent questions with respect to the conduct of his business may develop these delinquencies. We think that to pose this question is to answer it. For to approve the appellant's contention would mean that every business man would be entitled to decline to state his business merely because it might be possible that in carrying it on he had infringed the internal revenue laws or some other federal statute. This court ruled against this contention in Camarota v. United States, supra, when we held that Camarota was required to answer questions as to whether he had engaged in a certain business, not unlawful under the federal law, even though he contended that answers to anticipated subsequent questions as to his receipts from such business might tend to incriminate him of a violation of the income tax laws. See also United States v. Weinberg, 2 Cir. 1933, 65 F. 2d 394, 395, cert. den. 290 U. S. 675. We accordingly conclude that the court did not err in denying the appellant's claim of privilege with respect to these questions.

Turning to the other group of questions involved on this appeal it will be recalled that the appellant had already testified that he knew number writers around 1133 West Diamond Street, men who were in the numbers business. It was only when he was asked to name those whom he had said he knew that he asserted his privilege against self incrimination. As we have already indicated, the sole basis advanced by the appellant to support his fear of incrimination was that his answers might tend to show him guilty of the violation of the internal revenue laws. The appellant has not pointed out to us and we are unable to understand how disclosure by the witness of the names

of the number writers whom he admits that he knows could form a link in a chain of evidence which would convict him of the violation of any of the federal statutes to which he refers. We are satisfied, therefore, that the order of the court directing appellant to answer this question was lawful and did not infringe his constitutional rights under the Fifth Amendment.

We have considered the other contentions made by the appellant but find them so lacking in substance as to require no discussion.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,336

UNITED STATES OF AMERICA

vs.

IRVING GREENBERG, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Biggs, Chief Judge, and Maris and Hastie, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest: Ida O. Creskoff, Clerk.

February 8, 1951.

(Received & Filed Feb. 8, 1951. Ida O. Creskoff, Clerk.)

[fol. 254] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 255] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,336

UNITED STATES OF AMERICA

vs.

IRVING GREENBERG, Appellant

Present: Biggs, Chief Judge, and Hastie, Circuit Judge.

It is hereby Ordered that the above-entitled case be set down for reargument.

By the Court, Biggs, Chief Judge.

June 19, 1951.

(Received & Filed June 19, 1951. Ida O. Creskoff, Clerk.)

[fol. 256] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 586

IRVING GREENBERG, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed June 4, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied

the petition shall be treated as though filed in response to such writ.

A true copy. Test:

Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by Hugh W. Barr, Deputy.

Received & Filed Jul. 9, 1951. Ida O. Creskoff, Clerk.

[fol. 257] UNITED STATES OF AMERICA, ss:

The President of the United States of America, To the Honorable the Judges of the United States Court of Appeals for the Third Circuit.

(Seal.)

GREETING:

Whereas, lately in the United States Court of Appeals for the Third Circuit, in a cause between Irving Greenberg, Appellant, and The United States of America, Appellee, No. 10336, wherein the judgment of the said Court of Appeals, entered in said cause on the 8th day of February, A. D. 1951, is in the following words, viz:

"This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed," as by inspection of the transcript of the record of the said United States Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was dully submitted:

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, vacated.

And it is further ordered, That this cause be, and the same is hereby, remanded to the said Court of Appeals for reconsideration in the light of Hoffman v. United States, No. 513, October Term, 1950, decided May 28, 1951. June 4, 1951. You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the judgment and opinion of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

[fol. 258] Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the fifth day of July, in the year of our Lord one thousand nine hundred and fifty-one.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States, by Hugh W. Barr, Deputy.

[fol. 259] [Endorsed:] File No. —. Supreme Court of the United States, No. 586, October Term, 1950. Irving Greenberg vs. The United States of America. Mandate. Received & Filed Jul. 9, 1951. Ida O. Creskoff, Clerk.

[fol. 260] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,336

UNITED STATES OF AMERICA

v.

IRVING GREENBERG, Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania

Reargued October 15, 1951

Before Maris, Goodrich and Kalodner, Circuit Judges

OPINION OF THE COURT—Filed November 15, 1951

By MARIS, Circuit Judge:

This court in an opinion filed February 8, 1951, 187 F. 2d 35, affirmed the conviction of Irving Greenberg for contempt of court in refusing to obey an order of the district court to answer certain questions propounded to him before a grand jury. The issue involved was whether Greenberg should have been accorded the constitutional privilege which he claimed against answering the questions. The facts are fully set out in our prior opinion and therefore need not be detailed here. On a petition for a writ of certiorari to the Supreme Court, that court [1] vacated the judg- [fol. 261] ment of this court and remanded the case to us for reconsideration in the light of the decision in Hoffman v. United States, 1951, 341 U. S. 479.

The case has been reargued and fully reconsidered. We are satisfied nonetheless that our prior decision was right, that the ruling in the Hoffman case has not impaired it and that it should stand.

The facts of the two cases are similar in that both Hoffman and Greenberg were called before the same grand jury and refused to give answers to questions as to the nature

[1] 341 U. S. 944.

of their respective businesses. But here the similarity ends. In the Hoffman case the setting of the controversy with respect to Hoffman's refusal to disclose his business indicated that he had been publicly charged with being a known underworld character and a racketeer with a twenty-year police record including a prison sentence on a narcotics charge and that while waiting to testify before the grand jury he had been photographed with the head of the local federal Bureau of Narcotics. This background had not been before the district judge when he convicted and sentenced Hoffman but first came into the case after appeal on a petition to the district court for reconsideration of allowance of bail. The majority of this court, while conceding that these facts "would rather clearly be adequate to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy", held that since they were not before the district judge when he convicted and sentenced the defendant, they could not affect the validity of that conviction which was accordingly affirmed. 185 F. 2d 617.

The Supreme Court, however, took the view that this court should have considered "in connection with the business questions, that the chief occupation of some persons involves evasion of federal criminal laws, and that truthful answers by petitioner to these questions might have disclosed that he was engaged in such proscribed activity." It also concluded that the petition for consideration of [fol. 262] allowance of bail pending appeal was in reality an application to the district court to vacate the contempt order on constitutional grounds and that it should have been considered by this court in determining whether the district court erred in denying Hoffman's claim of privilege. It will thus be seen that the whole setting of the Hoffman case raised the strong suspicion that he might be engaged in the narcotics business, a business with respect to which he was entitled to claim his constitutional privilege against incrimination since engaging in it would have necessarily involved the violation of federal law.

The setting and background of Greenberg's case are wholly different. There is in the record no suggestion that Greenberg might be engaged in a business which violates

the federal law. On the contrary, everything in the record suggests that the unlawful business in which he might be engaged is the so-called "numbers" business, an activity proscribed by Pennsylvania law and to which his constitutional immunity does not extend.[2] In the absence of any contention on Greenberg's part that the mere disclosure of his business, as such, may tend to incriminate him of a federal crime we regard the ruling of the Supreme Court in Hoffman's case as wholly inapplicable.

This becomes even clearer when we recall that Greenberg's contention is based on wholly different grounds. It is that if he discloses his business the next questions asked him would be whether he had derived income from that business, whether he had employees in that business and whether he kept records of that business. He contends that his answers to these prospective questions might tend to incriminate him of criminal violations of the internal revenue laws relating to the income tax and the withholding of income and social security taxes from employees' wages. For the reasons stated in our prior opinion we do not think that Greenberg's possible privilege against answering these [fol. 263] prospective questions justifies him in refusing to answer the question as to the nature of his business.[3] We accordingly adhere to our conclusion that the district court did not err in denying the appellant's claim of privilege as to the business questions.

The other group of questions as to which Greenberg's claim of privilege was denied by the district court involved the names of number writers whom he had testified that he knew. The Hoffman case did not involve questions of this sort and the ruling in that case is not applicable to them. In our prior opinion we stated the reasons which led us to conclude that the order of the district court which directed Greenberg to answer these questions did not infringe his

---

[2] United States v. Murdock, 1931, 284 U. S. 141, 149; 1933, 290 U. S. 389, 396.

[3] See also Camarota v. United States, 3 Cir. 1940, 111 F. 2d 243, cert. den. 311 U. S. 651.

constitutional rights under the Fifth Amendment. We adhere to that conclusion and need add nothing to what we there said.

The judgment of the district court will be affirmed.

A true Copy:
Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 264] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,336

UNITED STATES OF AMERICA

vs.

IRVING GREENBERG, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Maris, Goodrich and Kalodner, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

Ida O. Creskoff, Clerk.

November 15, 1951.

(Received & Filed November 15, 1951. Ida O. Creskoff, Clerk.)

[fol. 265] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 461

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 28, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX.

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional provision and statutes and regulations involved	3
Statement	3
Reasons for granting the writ	12
Conclusion	25
Appendix	26

CITATIONS.

CASES:

Alexander v. *United States*, 181 F. 2d 480	17
Berry v. *Midtown Service Corporation*, 104 F. 2d 107	21
(Patricia) Blau v. *United States*, 340 U. S. 159	17
Camarota v. *United States*, 111 F. 2d 243, certiorari denied, 311 U. S. 651	14
Cole v. *Arkansas*, 333 U. S. 196	21
Edwards v. *United States*, 312 U. S. 473	24
Estes v. *Potter*, 183 F. 2d 865, certiorari denied, 340 U. S. 920	17
Healey v. *United States*, 186 F. 2d 164	17
Hill v. *United States*, 298 U. S. 460	19
Hoffman v. *United States*, 341 U. S. 479	2, 4, 12, 13, 14, 15, 17
Johnson v. *United States*, 318 U. S. 189	15
Morgan v. *United States*, 95 F. 2d 830	21
Schooner Hoppet v. *United States*, 7 Cranch 389	21
United States v. *Andolschek*, 142 F. 2d 503	24
United States v. *Beekman*, 155 F. 2d 580	24
United States v. *Grayson*, 166 F. 2d 863	24
United States v. *Hoffman*, 185 F. 2d 617	13, 15
United States v. *Pink*, 315 U. S. 203	17

Page

United States v. *Remington*, 191 F. 2d 246, pending on certiorari, No. 387, this Term 24
United States v. *Rosen*, 174 F. 2d 187, certiorari denied, 338 U. S. 851 22
United States v. *Weisman*, 111 F. 2d 260 15
United States v. *Zwillman*, 108 F. 2d 802 23
United States ex rel. Touhy v. *Ragen*, 340 U. S. 462 .. 24
Watkins v. *Merry*, 106 F. 2d 360 19

CONSTITUTION:

Fifth Amendment 26

STATUTES:

18 U. S. C. 401(1) 8, 22, 25, 26
18 U. S. C. 401(3) 8, 24, 25, 26
26 U. S. C. 145(a) 26
26 U. S. C. 145(b) 27
26 U. S. C. 145(c) 15, 27
26 U. S. C. 1430 27
26 U. S. C. 1622 28
26 U. S. C. 1627 28
26 U. S. C. 2707 28
26 U. S. C. 3809(a) 15, 27

REGULATIONS:

26 C. F. R. 402.601 29
26 C. F. R. 402.609 30
26 C. F. R. 405.601 30
Treasury Regulations 111, Sec. 29.54-1 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No.

IRVING GREENBERG, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

IRVING GREENBERG, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on November 15, 1951.

OPINIONS BELOW.

The opinion of the court of appeals on the first appeal (R. 234-241) is reported at 187 F. 2d 35. The *per curiam* order of this Court granting certiorari and vacating the judgment is reported at 341 U. S. 944. The opinion of the court of appeals after remand (R. 245-248) has not yet been reported.

JURISDICTION.

The judgment of the court of appeals was entered on November 15, 1951 (R. 248). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED.

1. Whether the court of appeals properly applied to this case the rationale of *Hoffman* v. *United States*, 341 U. S. 479, *viz.*, that the privilege against self-incrimination extends to questions the answers to which would furnish a link in the chain of evidence needed to convict the petitioner of a federal crime, as it was directed to do in the mandate of this Court.

2. Whether a witness can properly be convicted of refusing to answer questions the answers to which he claims would tend to incriminate him, where he subpoenas the prosecutor's files and seeks to examine the minutes of the Grand Jury to show that his answers would in fact incriminate him, but he is not permitted to obtain the records so subpoenaed and sought to be examined.

3. Whether, where the record shows a general finding of guilty on all charges, but the formal judgment and commitment varies that finding in numerous material respects, a court of appeals may dispose of the appeal on the basis of the later formal judgment and commitment instead of on the basis of the actual proceedings at the trial.

4. Whether it is proper to try a defendant in a criminal case on one theory, for commission of one offense, and then to affirm his conviction on the theory that he has committed a different offense.

5. Whether a defendant may be convicted of disobedience of an order of a court where there is no showing in the record that he was ever given any specific order by the court.

CONSTITUTIONAL PROVISION AND STATUTES AND REGULATIONS INVOLVED.

The Constitutional and statutory provisions and regulations involved are set forth below in the Appendix, *infra*, pp. 26-30.

STATEMENT.

On September 14, 1950, the Grand Jury of the United States for the Eastern District of Pennsylvania undertook an inquiry involving, *inter alia*, violations of the internal revenue and other criminal laws of the United States, and conspiracy to commit those offenses (R. 2a). On October 2, petitioner was subpoenaed to appear as a witness before said Grand Jury, at which time he refused to answer certain questions propounded to him, on the ground that the answers thereto would tend to incriminate him (R. 2a).

Thereupon, on October 9, petitioner's refusal to answer specified questions, including a question as to whether he was in the numbers business, was brought to the attention of the district court by the special prosecutor, one Goldschein (R. 203-204). Extensive hearings then followed on petitioner's claim of privilege, on October 9, 17-20, 23, 30, and 31.*

The first question to which the prosecutor sought an answer was whether petitioner was in the numbers business. Also sought to be answered were questions as to the identity of certain numbers writers at his place of business known to petitioner, and in particular, whether petitioner had ever met, *inter alia*, Willie Weisberg and Cappy Hoff-

---

* The proceedings appear in this record in the following order: *October 9:* R. 203-205; R. 71a-95a; R. 215-216; R. 95a-99a. *October 17:* R. 99a-102a. *October 18:* R. 102a-109a. *October 19:* R. 109a-112a. *October 20:* R. 112a-115a; R. 205-207; R. 115a-117a; R. 216-220; R. 117a-118a; R. 220-222; R. 207-209; R. 222-223; R. 118a-119a; R. 211a; R. 119a-120a; R. 209; R. 223-230; R. 120a-121a. *October 23:* R. 121a-143a; R. 209 (last line)-212; R. 143a-145a. *October 30:* R. 230-233; R. 145a-148a. *October 31:* R. 149a-156a.

man there.[1] Petitioner was also asked what business he used his telephone for, this after he had answered that he did not use it for any lawful business.[2] It was contended on petitioner's behalf that the questions propounded, though on their face innocent, or in any event not on their face criminating as to federal law, would none the less supply links in a chain of evidence showing the commission of federal offenses, particularly under provisions of the Internal Revenue Code (*infra*, pp. 26-29), which require the keeping of books and records and penalize the failure to withhold pay of employees subject to federal income tax and to make social security payments, and also under those provisions which prohibit the making of a return which the taxpayer does not believe true as to every material matter.

The district judge inclined to the view that the incriminating nature *vel non* of the questions propounded, in the light of these provisions, turned on whether or not there were employees in the numbers business (R. 119a, 223-224). Meanwhile, in order to show the incriminating nature of the questions at issue, petitioner's counsel subpoenaed the prosecutor Goldschein to bring with him all his records concerning petitioner (R. 99a-100a, 110a-111a), and sought to examine the Grand Jury minutes pertaining to petitioner (R. 148a).

On October 23, petitioner testified that he refused to answer the questions because the answers would incriminate him under the internal revenue laws; that he stated in his 1949 income tax return that he was engaged in a

---

[1] See R. 3a, 204. "Willie Weisberg" appears to be the "William Weisberg" about whose whereabouts the petitioner in *Hoffman* v. *United States*, 341 U. S. 479, 481, 488-489, was interrogated; and "Cappy Hoffman" was the petitioner Samuel Hoffman involved in that case. See R. 11-14, No. 513, Oct T. 1950.

[2] This was the substance of the questions around which the discussions in the district court revolved; the exact form of the unanswered questions which were later the subject of the presentment are set forth below, p. 7, *infra*.

certain business[3] and listed other income under "Miscellaneous"; and that his apprehension that his answers to the questions would tend to incriminate him was based on what he had read in the newspapers, his counsel's advice, and his own knowledge of what his answers would be (R. 130-132). He was not cross-examined on his testimony. His counsel, Morton Witkin, Esq., then testified that, after discussing the matter with petitioner, it was his opinion that answers to the questions involved would be incriminating (R. 143a). Mr. Witkin was not cross-examined either (R. 210). Again the court emphasized the fact that petitioner had not admitted that he did not keep any books or records or that he had not withheld withholding taxes (R. 134a, 135a, 136a, 137a).

On October 30, the proceeding resumed (R. 230), apparently after petitioner, having appeared again before the Grand Jury and having admitted that he knew numbers writers, had refused to answer the question *Who?* (R. 3a-6a). The district judge then said (R. 231),

> I don't see here where there is any direct tendency to incriminate him. It may involve numbers writers, but I won't bridge that gap. I am directing him to answer who they are. * * * the question just is, does he know them. He doesn't say that he is associated with them.

There is no showing whatever in the record that petitioner was in court on this occasion.

The colloquy between court and counsel continued (R. 231-233), and then the district judge said (R. 145a-146a):

> THE COURT: I am getting to that.
> These repeated refusals to answer concern itself with the basic question "Are you in the numbers business?" I think that the continued getting around it in various or different variations with respect to it, since

[3] This referred to his real estate business and not the business to which the questions were directed. See R. 131a-132a, 218.

counsel have chosen to make their stand, I think they ought to go up on the question "Are you in the numbers business?" I don't understand the Government's position. Is it that you think eventually you are going to get the answer, Mr. Goldschein?

MR. GOLDSCHEIN: Yes.

THE COURT: Don't you think we would be better off to get a ruling from the Circuit Court as to that main question rather than side issues? I don't mean by that in anywise to say that it isn't pertinent and necessary, but aren't we just getting around, if he refuses to answer that he is in the numbers business, you have the unlawful business specifically decided, and the Court will decide. *Why don't you go up on the main issue as to whether or not he is in the numbers business?* [Italics added.]

The judge further said (R. 146a), "I am going to rule here, that these questions have to be answered, * * *."

Thereupon petitioner's counsel again sought a ruling on his subpoena *duces tecum* seeking the prosecutor's papers (*supra*, p. 4), and on the latter's motion to quash that subpoena (R. 146a-149a); the district judge ruled that (R. 150a)—

with respect to that motion for the production of the documentary evidence, on the record as it now is it will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate.

And again (R. 151a, 152a)—

Until you make some showing you will not see those records.

* * * * * * * *

The next one is "Irving Greenberg by his counsel again requests the Court to allow him the minutes of the Grand Jury to show the questions asked of Irving Greenberg would tend to incriminate him."

I deny that motion.

Thereafter, on November 1, the Grand Jury made formal presentment (R. 157a) that petitioner had refused to answer particular questions. It was pointed out that petitioner's reasons for his refusal to answer did not appear in the presentment (R. 158a-165a), whereupon the district judge ruled that the presentment should be amended to include such answers as petitioner actually gave before the Grand Jury (R. 165a-169a). After a recess, the Grand Jury returned with an amended presentment (R. 170a, 2a-9a), which was further amended, on motion, to include petitioner's answers in full by incorporating the same by reference (R. 173a-180a). Two days later, on November 3, petitioner was tried on the presentment as thus amended.[4]

The presentment alleged petitioner's refusal to answer four questions, on the ground that the answers would tend to incriminate him: (1) *Are you in the numbers business now?* (R. 4a). (2) *Who?*, being the question asked after he had answered that he knew men around a specified address who were in the numbers business (R. 5a-6a). (3) *Do you use it for any other business?* and (4) *What business do you use it for?*, after he had answered that he did not use his telephone for any lawful business R. 6a).[5]

The presentment then alleged that petitioner (a) by his refusal to answer the questions propounded to him had thwarted the Grand Jury's investigation and obstructed the administration of justice, and that (b) he had disobeyed the orders of the court to answer before the Grand

---

[4] In the presentment as printed in the record (R. 2a-9a), these additional answers in full which were added at the direction of the court (R. 173a-179a) have not been included.

[5] The district judge was persuaded by petitioner's counsel that only three questions remained unanswered (R. 13a-14a). But since the court of appeals assumed that there were two unanswered questions dealing with petitioner's telephone (R. 236, 238), and since the issues now presented are not thereby varied, we are accepting the court of appeals' assumption for purposes of this petition.

Jury the aforesaid questions (R. 8a).[6] The presentment prayed that the court invoke its punitive power against petitioner (R. 8a-9a)—

> to preserve the authority and vindicate the dignity of the Court in order to maintain the proper functioning of the Court and the Grand Jury, and that this Honorable Court exercise its authority so that its power to punish may serve as a deterrent to other recalcitrant witnesses, who may be inclined to obstruct the business of this Grand Jury.

At the trial, petitioner was brought to the bar of the court (R. 10a), and the four questions above set out were read to him (R. 10a-13a). In answer to a question by the court, petitioner admitted that he had refused to answer those questions before the Grand Jury (R. 13a).[7] Thereupon the district judge said (R. 14a):

> Now, you say those are the questions you were asked in the Grand Jury room?
>
> The burden here shifts to the defendant. What is your wish here, gentlemen?

Whereupon petitioner's counsel elected to proceed with the trial.[8]

---

[6] As the court of appeals pointed out (R. 235), "Charge (a) involved a violation of clause (1) of Sec. 401 of title 18, United States Code, and charge (b) involved a violation of clause (3) of that section." The text of the statutory provisions is set out in the Appendix, *infra*, p. 26.

[7] No point is made here that requiring petitioner to answer the court's question obviously compelled him to testify against himself in a criminal case.

[8] This procedure followed that previously outlined by the district judge (R. 182a): "I am going to call him to the bar of the Court and I am going to ask him whether he refused to answer these questions before the Grand Jury and give him an opportunity to answer them now, and then I will give you an opportunity, if you so wish, to offer evidence to us or go forward, if you will, to show that these questions, he does have reasonable ground for the apprehension of danger."

At the trial, petitioner directed the court's attention to the pertinent provisions of the Internal Revenue Code and the regulations thereunder pertaining to withholding taxes on employees, on social security taxes, and on the requirement for keeping records and making accurate returns (R. 15a-18a; *infra*, pp. 26-30. Petitioner introduced in evidence the relevant portions of the earlier hearings (R. 14a-15a, 71a-195a). Next, petitioner adduced the testimony of a recognized tax expert (R. 19a) to show that, if petitioner during 1950 was engaged in an unlawful business or in the numbers business, and such business required employees, then petitioner would be obliged to file returns under the Internal Revenue laws (R. 19a-26a).

It was also shown that the numbers business involved employees and that petitioner had so testified before the Grand Jury in answer to questions asked by the prosecutor (R. 25a-26a).

After a representative of the Collector of Internal Revenue had refused because of departmental regulations to honor a subpoena requiring the production of petitioner's withholding tax returns (R. 30a-36a), and had been sustained by the court in such refusal (R. 35a, 36a)[9] petitioner testified that he did not file any withholding returns during 1950 (R. 37a).

Petitioner's counsel, Mr. Witkin, was permitted to incorporate by reference (R. 57a) his testimony at the preliminary hearings that "It is my honest, sincere and legal opinion that were Mr. Greenberg to answer the questions which were propounded to him that he would be incriminating himself" (R. 143a).

Petitioner then called as his next witness the prosecutor Goldschein, who was in charge of the Grand Jury investigation, to show, *inter alia*, that petitioner was being investigated by the Grand Jury and by the Govern-

[9] "THE COURT: • • • Let Greenberg take the stand if he didn't file. I won't compel the Government to do that. If they don't want to do it, I certainly will not tell them to." (R. 35a.)

ment (R. 49a) and that the prosecutor's file contained proof of petitioner's precise unlawful business (R. 49a). Petitioner's counsel offered to prove not only the foregoing, but also that other witnesses before the Grand Jury were asked questions regarding petitioner; that petitioner himself was under investigation; that it was part of the plan of the prosecution to show that petitioner was guilty of violating the internal revenue laws; and that upon petitioner's answering the questions now involved, he would forthwith be prosecuted (R. 48a-52a). Objection to this offer of proof was sustained (R. 53a). Petitioner then introduced newspaper clippings to document his contention (R. 132a, 176a) that his "fear and apprehension that I would tend to incriminate myself" was based in part on "that which I have read in the newspapers." These newspaper articles (Def. Ex. I, R. 56a, 196a-197a) quoted the Department of Justice spokesman as saying that "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws," and, further, "Goldschein himself stressed the importance of 'conspiracy' which, the other spokesman said, might lead to tieups between police and politicians and underworld characters."

The district judge did not permit petitioner's counsel to examine the records and documents in the prosecutor's possession which they sought for the purpose of showing the incriminating nature of the unanswered questions (R. 53a-54a), nor did he examine them himself. He refused permission to examine the Grand Jury minutes (R. 53a-54a), and he reserved decision on the motion with respect to quashing the subpoena *duces tecum* (*supra*, pp. 4, 6) "until proper showing is made" (R. 53a).

After both sides had rested, the judge reserved decision on the case (R. 64a). When the proceedings were resumed, on November 8, petitioner was called to the bar of the Court, and the district judge said (R. 65a):

> I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't I am ready to impose sentence. Do you want to answer?

Petitioner's counsel said, "We take the same position we have taken before, may it please Your Honor." Thereafter, after listening to argument on the sentence (R. 65a-71a), the district judge sentenced petitioner to five months' imprisonment, and admitted him to bail in the amount of $10,000 pending appeal (R. 71a). An appeal was taken on the same day (R. 1a).

Two days later, on November 10, the district judge signed a formal judgment and commitment (R. 198a-201a), which differed in several material respects from the earlier oral finding of guilty. (1) The formal judgment omitted all mention of the first unanswered question set out in the presentment, viz., *Are you in the numbers business now?* (2) The formal judgment reflected a finding of guilty as to only one of the charges made in the presentment, viz., disobedience of an order of the court and said nothing as to the other charge, viz., obstruction of justice. (3) There was a variance between the recital in the formal judgment as to what happened on November 8, and the stenographic record of that day's proceedings.[10]

On appeal, the court below affirmed petitioner's conviction, on the view that there was no finding that petitioner's refusal to answer the first question was a contempt, that the district court had held him in contempt only for disobeying its order to answer the remaining questions, and that there was no finding that petitioner obstructed justice by refusing to answer questions before the Grand Jury (R. 234-241); the court therefore said (R. 236):

---

[10] Since this last point might conceivably be regarded as argumentative, the details are set forth below, pp. 19-21.

> Accordingly we do not have to consider whether the appellant, in claiming his constitutional privilege under advice of counsel, as he did, could be convicted of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury. Certainly the assertion of a constitutional right if made in good faith on advice of counsel could hardly be described as such misbehavior.

Petitioner thereupon petitioned for a writ of certiorari, which was granted, this Court saying *per curiam* (341 U. S. 944), "The judgment of the Court of Appeals is vacated and the case is remanded to that court for reconsideration in the light of *Hoffman* v. *United States,* 341 U. S. 479."

After reargument, the court below adhered to its previous ruling and reaffirmed the judgment of conviction, being "satisfied that our prior decision was right, that the ruling in the Hoffman case has not impaired it, and that it should stand" (R. 245). The court of appeals held that there was no contention that the mere disclosure of petitioner's business would tend to criminate him of a federal crime, and that the questions asked of petitioner as to the names of numbers writers whom he had testified that he knew at his place of business were not involved in the *Hoffman* case.

REASONS FOR GRANTING THE WRIT.

This case is here for the second time because of the unwillingness or inability of the court below to give full and ungrudging effect to the command of the Fifth Amendment that "No person * * * shall be compelled in any criminal case to be a witness against himself," and because that court, which was directed to reconsider this case in the light of the subsequently announced decision in *Hoffman* v. *United States,* 341 U. S. 479 (in which its own judgment was reversed), either ignored or misap-

plied that ruling, preferring its own substantially narrower reading of the constitutional privilege.

Moreover, a most shocking feature of this case still permeates the entire proceeding: The United States has prosecuted and convicted petitioner while simultaneously denying him the ability to defend; it has successfully contended that he was guilty of contempt in refusing to answer questions, claimed by him to be self-incriminating, and yet was permitted to assert its privilege when he sought to obtain records in its possession which would have substantiated his claim.

1. The first question raised in the present posture of this case is that the court of appeals did not heed the mandate of this Court to give effect to the decision in *Hoffman* v. *United States*, 341 U. S. 479, as to the scope of the privilege against self-incrimination.

a. One phase of that problem turns on petitioner's refusal to state what his business was, in connection with the questions (1) *Are you in the numbers business now?;* and, after he had answered that he did not use his telephone for any lawful business, (3) *Do you use it for any other business?* and (4) *What business do you use it for?*

In its second opinion the court below said that "There is in the record no suggestion that Greenberg might be engaged in a business which violates the federal law" (R. 246-247), and pointed out that "everything in the record suggests that the unlawful business in which he might be engaged is the so-called 'numbers' business, an activity proscribed by Pennsylvania law and to which his constitutional immunity does not extend" (R. 247).[11]

[11] The reliance by the court of appeals in both opinions (R. 237, 238, 247) on its decision in *Camarota* v. *United States*, 111 F. 2d 243, certiorari denied, 311 U. S. 651, is assuredly misplaced, for there the prosecutor told the court that he was not seeking an indictment, nor trying to determine what the witness's income was (R. 57, No. 135, Oct. T. 1940), nor what the witness's business was, since that was revealed by his income tax return (*id.*, at R. 33). The present case, obviously, is wholly different.

This conclusion not only wholly disregards this Court's ruling in the *Hoffman* case, and reverts to the earlier and narrower doctrine of the court below laid down in that case before reversal, 185 F. 2d 617, but also overlooks the connection between this petitioner and Hoffman, and between this petitioner and the Weisberg concerned in *Hoffman's* case—a connection which appears in the opening paragraphs of the Grand Jury's presentment (R. 3a).

This Court in *Hoffman* specifically said (341 U. S. at 486-487):

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. * * * To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result.

Here, petitioner showed that he had not filed any social security or withholding tax returns (R. 37a). He showed that such returns would have been required as a matter of federal law, if while engaged in a business unlawful under state law, he had any employees in such business (R. 19a-26a). He showed that the nature of the numbers business was such that it required employees (R. 25a-26a). He stated that he had used his telephone "not for any lawful business" (R. 8a). And he showed that the prosecutor had announced in the public press an intention to strike at "numbers, slot machines and other rackets * * * through the Federal revenue and conspiracy laws" (R. 196a) "even though there are no Federal laws regarding numbers" (*ibid.*), and that his own fear of self-incrimination

was based in part on what he had read in the newspapers (R. 56a, 132a, 176a).[12]

Moreover, if petitioner testified to being engaged in any business, whether lawful under both state and federal law, or unlawful under either, that fact would be relevant to prove that he had previously been engaged in that business. See *Johnson* v. *United States*, 318 U. S. 189, 195-196. If, therefore, the proceeds of that business had not been reflected in his records or returns, he could not possibly answer any question relating to that business without incriminating himself under Sections 145(c) or 3809(a) of the Internal Revenue Code, *infra*, p. 27, regardless of the nature of that business. And, significantly, this grand jury was investigating violations of the internal revenue laws (R. 2a), and the prosecutor had announced that he was striking at "numbers * * * and other rackets * * * through the federal revenue and conspiracy laws" (R. 196a, 197a).

In those circumstances, we submit, he had shown enough to indicate that he was in danger without going on to testify that in fact he himself had employees in his ventures, or that he himself was in the numbers business or concerning the unlawful business for which he used his telephone. The answers to such questions were the critical links in the

---

[12] Even the court below agrees that, if such newspaper articles are introduced at the trial, they are competent "to establish circumstantially the likelihood that appellant's assertion of fear of incrimination was not mere contumacy." *United States* v. *Hoffman*, 185 F. 2d 617, 621. *Accord: United States* v. *Weisman*, 111 F. 2d 260, 262 (C. C. A. 2).

In the present case the court below reaffirmed its ruling as to newspapers, made in *Hoffman*, but went on to say (R. 239) that here "appellant made no such showing." Apparently a newspaper reference to a witness as an underworld figure is sufficient in the view of the court below to establish a fear of possible self-incrimination (*Hoffman*), while a similar reference to the prosecutor's plan to strike indirectly at violators of state laws through the federal tax and conspiracy laws is insufficient (the present case).

And see R. 3a, 223, and p. 17, *infra*, for the prosecutor's attempt to link this petitioner with Hoffman.

chain; affirmative answers would have been admissions of guilt. In any event, petitioner had shown enough to be justified in believing that he was in a precarious position. Accordingly, we submit further, he was justified in refusing to answer the questions above-noted, which might lead to the discovery of evidence linking him with a violation of federal law or with a federal conspiracy, even though the answer to the particular question might not by itself incriminate him federally. That, assuredly, is the rationale of the *Hoffman* decision in this Court. Consequently the holding of the court below (R. 247), that "In the absence of any contention on Greenberg's part that the mere disclosure of his business, as such, may tend to incriminate him of a federal crime we regard the ruling of the Supreme Court in Hoffman's case as wholly inapplicable," amounts in substance to a refusal to apply the law laid down by this Court.

Moreover, the quoted passage reflects a thoroughgoing unfamiliarity with the record in this case. For the very terms of the Grand Jury's presentment showed that petitioner specifically and explicitly refused to answer the question *Are you in the numbers business* now? "because the answer I would give you will tend to incriminate me of a violation of the Federal Criminal Statutes" (R. 4a). Additionally, as we have shown, *supra*, pp. 5, 9, petitioner's attorney and his accountant testified that the disclosure of his business would incriminate him under federal law, and he attempted to examine the Grand Jury minutes and to question the prosecutor, all in an effort to prove the incriminating tendency of the inquiries. Obviously, therefore, the result of the second opinion is that, in the Third Circuit, nothing less than clear admission of guilt under federal law is a sufficient foundation for the exercise of the constitutional privilege. Thus this Court's *Hoffman* decision has been nullified, and this Court's mandate herein has been wholly ignored.

b. Another phase of the scope of privilege against self-incrimination is involved in petitioner's refusal to name

numbers writers of his acquaintance around his place of business (R. 5a-6a). As to this the court below in its second opinion simply says (R. 247), "The Hoffman case did not involve questions of this sort and the ruling in that case is not applicable to them." But the *Hoffman* case upheld that petitioner's refusal to answer, on grounds of self-incrimination, questions regarding his acquaintance with one William Weisberg. See 341 U. S. at 488-489 for language fully applicable to this phase of the present case. And a similar claim of privilege was upheld by this Court in *Patricia Blau* v. *United States*, 340 U. S. 159, where the witness was asked whether she knew the names of officers of the Communist Party. Moreover, the presentment in this case (R. 3a) shows the prosecutor's attempt to link this petitioner both with Cappy Hoffman, the protagonist of *Hoffman* v. *United States*, 341 U. S. 479, see R. 11-14, No. 513, Oct. T. 1950, who had a criminal record extending over 20 years (341 U. S. at 489), and with Willie Weisberg, who assuredly is the same individual—and fugitive from justice, 341 U. S. at 488—about whom Hoffman was questioned. This identity was well within the realm of judicial notice. See *United States* v. *Pink*, 315 U. S. 203, 216, and cases there cited. Thus not only the rationale of the *Hoffman* case but also its very characters appear in this case. We submit that both elements imperatively require reversal of the Third Circuit's reaffirmed judgment of conviction under the present heading.[13]

---

[13] If it were necessary to rely on a conflict between circuits, we could point to *Alexander* v. *United States*, 181 F. 2d 480 (C. A. 9); *Estes* v. *Potter*, 183 F. 2d 865 (C. A. 5), certiorari denied, 340 U. S. 920; and *Healey* v. *United States*, 186 F. 2d 164 (C. A. 9), in each of which a witness's refusal to answer questions similar to those asked Patricia Blau was sustained. As the court in the *Healey* case said (186 F. 2d at 168), "what a lead to the Federal Bureau of Investigation to investigate the details of the relationship" an affirmative answer would give. But it seems to us sufficient for present purposes to rest on the disregard by the court below of the *Blau* and *Hoffman* rulings of this Court.

2. We turn now to the questions in this case involving the court of appeals' misreading of the record, and we do so at this juncture, not because of their relative importance, but because they assist in clarifying the remaining points.

As the court below properly noted (R. 235) that the presentment charged both a violation of 18 U. S. C. 301(1) —refusal to answer four questions before the Grand Jury —and of 18 U. S. C. 401(3), deliberate disobedience of an order of the district court to answer those same four questions. See R. 8a. After the trial, the judge made a general finding of guilty (R. 65a). Two days thereafter, he signed a formal judgment and commitment which varied that general finding, first, in that it found petitioner guilty only of refusing to answer the last three questions, omitting any finding as to the unanswered query, *Are you in the numbers business now?;* and second, in that it found petitioner guilty only of deliberate disobedience of the lawful order of the court, omitting any reference to petitioner's alleged obstruction of justice by failing to answer questions before the Grand Jury (R. 199a-201a).

In its first opinion, the court of appeals dealt with the case on the basis of the recitals in the November 10 judgment, not on the basis of the general finding of guilty made in open court two days earlier (R. 236). This treatment enabled the court below expressly to pass over, as it then did, two questions: (1) the alleged incriminatory character of the question *Are you in the numbers business now?* (R. 236); (2) whether petitioner "in claiming his constitutional privilege under advice of counsel, as he did, could be convinced of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury" (R. 236).

However, in its second opinion, the court of appeals considered—and held non-incriminatory—the question *Are you in the numbers business now?* The court had said in its first opinion that "it appears from the record that this

problem is not before us,'"[14] but the second opinion does not discuss or explain why or how that problem thereafter could have come before it. Clearly this Court's mandate did not of its own force enlarge the matters which were to be reconsidered on the remand.

Of course the rule is well settled that it is the judgment pronounced in court and not the later formal commitment, which controls; to the extent that the latter varies from what was said in court, it is utterly void. *Hill* v. *United States*, 298 U. S. 460; *Watkins* v. *Merry*, 106 F. 2d 360, (C. C. A. 10). If the court below had in fact looked to the record in obedience to that rule, it would also have been obliged to consider the finding of guilty in respect of refusal to answer questions before the grand jury. But it wholly failed to consider on the reargument after remand the question which arose on that footing, nor did it revert to its earlier comment, *viz.*, that (R. 236) "Certainly the assertion of a constitutional right if made in good faith on advice of counsel could hardly be described as such misconduct," i. e., obstructing the administration of justice.

The second opinion assuredly does not spell out a more accurate reading of the record, however much it may reflect a more compelling zeal to reaffirm petitioner's conviction.

3. In both opinions, the court of appeals rested its affirmance of petitioner's conviction on the basis of the disobedience by him of an order of the district court. But the record shows neither proof of any order by the district court, nor of any disobedience of such an order.

---

[14] "However, it appears from the record that this problem is not before us since the district court based the finding of contempt solely upon the appellant's refusal to answer the second and third groups of questions above mentioned and did not find that the appellant's refusal to answer this first question was a contempt of the court's order. We, therefore, do not here consider its alleged incriminatory character." R. 236.

The court of appeals said in its first opinion (R. 236) that petitioner "admitted at his trial that he had disobeyed the order of the district court by refusing to answer before the grand jury the questions which the court had ordered him to answer * * *." No such admission appears in this record. Petitioner admitted only that he had refused to answer the questions set out in the presentment (R. 13a; cf. R. 14a, lines 3-4). He admitted nothing as to any order of the court; obviously the mere recitals in the presentment as to such an order are no more evidence against him than similar recitals in an indictment would be; and the record is devoid of any proof of any such orders.

Only two rulings by the district court bearing on directions to answer appear in the record, and neither is shown to have been made in petitioner's presence (R. 231, 146a; *supra*, pp. 5-6). And there is a glaring variance between what actually occurred when sentence was pronounced, and what is recited in the later judgment and commitment concerning those occurrences:

Record (R. 65a)	Judgment and Commitment (R. 201a)
[November 8, 1950]	[November 10, 1950]
The Court: * * * I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't, I am ready to impose sentence. Do you want to answer?	* * * that on the 8th day of November in the year 1950 this Court gave the said witness, Irving Greenberg, another opportunity to answer the said questions and he, through his counsel, stated in open court *that he would not obey the Order of the Court and answer the question which the Court directed him to answer* as hereinabove set forth, thereby thwarting the investigation of the said Grand Jury and obstructing the administration of justice. [Italics added.]
Mr. Witkin: We take the same position we have taken before, may it please Your Honor. * * *	

In other words, while actually petitioner simply declined the proffered opportunity to purge himself of the contempt adjudged against him for refusal to answer questions before the Grand Jury, the recital in the subsequent judgment makes him appear to be "willfully, deliberately and contumaciously" disobeying and resisting a lawful order of the district court. And the court below affirmed the judgment of conviction on both occasions on the latter footing.

Obviously, therefore, petitioner here stands convicted of something which he is not shown to have done. The rulings in his absence (R. 231, 146a) do not amount to direct orders disobedience of which entails the penalties of contempt of court. *Morgan* v. *United States*, 95 F. 2d 830 (C. C. A. 8); *Berry* v. *Midtown Service Corporation*, 104 F. 2d 107 (C. C. A. 2). There simply is no proof here of any order, hence there can be none of disobedience of any order.

This failure of proof, it may fairly be remarked, is a consequence of the fact that whereas the sole emphasis at the trial was on petitioner's alleged violation of 18 U. S. C. 401(1), the gravamen of the formal judgment and commitment and of its affirmance on appeal was his violation of 18 U. S. C. 401(3). This circumstance would accordingly in any event involve a deprivation of due process of law, see *Cole* v. *Arkansas*, 333 U. S. 196, though the principle of the *Cole* case was early established: "The rule that a man shall not be charged with one crime and convicted of another" was long ago applied by this Court, in Chief Justice Marshall's time. *Schooner Hoppet* v. *United States*, 7 Cranch 389, 394.

4. Finally, we come to a very grave aspect of this case, perhaps even more serious than the court of appeals' disregard of this Court's mandate—the circumstance that petitioner was prosecuted while being denied opportunity to present evidence in his defense. This question arises under both charges of the presentment.

a. Obstruction of justice, 18 U. S. C. 401(1). To the extent that the questions asked did not on their face appear to call for answers which would tend to incriminate petitioner, it was incumbent upon him to establish their incriminating character (*United States* v. *Rosen*, 174 F. 2d 187, 188 (C. A. 2), certiorari denied, 338 U. S. 851, and cases there cited), and the district judge therefore properly ruled that the burden shifted to the petitioner once his refusal to answer had been established (R. 14a).

To meet this burden, petitioner sought to show that he had been placed in fear of incrimination by newspaper reports of the prosecutor's announced plan to strike indirectly at numbers activities, which do not involve federal offenses, through the federal revenue and conspiracy laws (R. 196a-197a), and, by subpoenaing the prosecutor and his papers and by attempting to examine the Grand Jury minutes, to show that the answers to the questions asked petitioner before the Grand Jury would supply the links in a chain of evidence which would show his commission of federal offenses (R. 45a-54a). Except for the newspapers, which were admitted for a limited purpose (R. 56a), petitioner was not permitted to make this showing (R. 35a, 53a-54a; *supra*, pp. 9-10).

This, we submit, was clearly error: It amounted to prosecuting petitioner while simultaneously denying him the right to defend. The reasoning of the court below, sanctioning this course, is, we submit with deference, impossible to follow.[15] But, in any event, the ruling of the court

---

[15] R. 238-239: "It is not necessary, of course, for the witness to prove that his answer would actually be incriminating, for to do so would be to lose the privilege in establishing it. Accordingly he need not prove that the government has in its possession or that the grand jury has secured from him or from other witnesses evidence which, when the answer to the question under attack is added, will be sufficient to complete the chain of evidence needed to convict him of federal crime. Here, as we shall see, the court was justified in concluding that a direct answer could not reasonably form a link in that chain. Accordingly the court did not err

below is squarely in conflict with that of the Second Circuit in *United States* v. *Zwillman*, 108 F. 2d 802, where a conviction had in identical circumstances was reversed. Judge A. N. Hand there said (108 F. 2d at 803-804):

> It is true that the government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby deprived him of his right to a proper trial where he could offer evidence in his defense.

The *Zwillman* ruling is simply an application of the broader principle that, when the United States institutes criminal proceedings in which evidence otherwise privi-

---

in refusing appellant access to the grand jury minutes and to the files of the goverment.* Where, as here, the question was innocent on its face all that the appellant was required to do was to satisfy the court that there was a reasonable possibility of the existence of facts in his situation and under the circumstances of his case which might convict him of a federal crime if a fact which might be disclosed by a direct answer to the controverted question were added to them."

* [Footnote in original] "We, of course, do not decide whether these contentions of the appellant would have been meritorious in connection with the charge contained in the presentment that he had contumaciously obstructed the administration of justice by blocking the inquiry being made by the grand jury, since the district court did not, as we have pointed out, convict him on this charge. That question may well involve other considerations."

As we have pointed out above, p. 18, the district court did convict petitioner of that charge also.

leged becomes importantly relevant, it abandons the privilege. *United States* v. *Andolschek*, 142 F. 2d 503 (C. C. A. 2); *United States* v. *Beekman*, 155 F. 2d 580 (C. C. A. 2); *United States* v. *Grayson*, 166 F. 2d 863 (C. C. A. 2); cf. *Edwards* v. *United States*, 312 U. S. 473, 481.[16]

The gist of petitioner's contention with specific respect to grand jury minutes has been but recently stated by Chief Judge Swan for the Second Circuit in *United States* v. *Remington*, 191 F. 2d 246, 250, pending on certiorari, No. 387, this Term:

> It is one thing to deny the defense access to grand jury minutes which it intends to use for the relatively negative purpose of impeaching a witness; it is quite a different thing to deny an accused access to the minutes of his own testimony which may afford him an affirmative defense.

Here petitioner sought the grand jury minutes for the expressed purpose of demonstrating that his fear of incrimination was well founded. We submit that, under the cited decisions, he was entitled to have them if—and as long as—the United States chose to continue the prosecution.

b. Disobedience of court's order, 18 U. S. C. 401(3). The same result would follow if it were assumed that, at the hearings prior to the presentment, petitioner had been squarely ordered by the court to answer the questions involved. At this juncture also, petitioner called for the prosecutor's files and the minutes of the Grand Jury to show the incriminating character of the questions asked him (R. 99a-100a, 148a). The district judge's ruling that (R. 150a) "that motion for the production of the documentary evidence * * * will still be held under advisement

---

[16] Wholly different considerations, of course, are involved when the privilege attaching to papers of the United States is asserted collaterally. Cf. *United States ex rel. Touhy* v. *Ragen*, 340 U. S. 462.

until and when you show by proper cause that these questions have a tendency to incriminate", and again (R. 151a), that "Until you make some showing you will not see those records," put the cart before the horse with a vengeance: It denied petitioner an opportunity to prove the incriminatory nature of the questions asked until he had first proved their incriminatory nature. Otherwise stated, the judge denied petitioner access to the evidence which he required to defend himself until he had first established his defense without that indispensable evidence.

The considerations under this heading are identical with those under the other: If petitioner was required to answer the questions by reason of 18 U. S. C. 401(1), he was required to obey the judge's order to answer them, under pain of 18 U. S. C. 401(3). By the same token, if he had a constitutional right to refuse to answer the questions before the Grand Jury, then the judge's order telling him to answer them was not lawful. In either event, petitioner could not properly be convicted when he was deprived of evidence which would show both that his refusal to answer was proper and that the judge's order that he answer was improper.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

DECEMBER 1951.

APPENDIX.

Constitutional Provision and Statutes and Regulations Involved.

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; * * *

2. Section 401 of Title 18, United States Code (1948 revision), provides:

> **§ 401. Power of court**
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

3. Section 145 of the Internal Revenue Code, 26 U. S. C. 145, provides:

> **§ 145. Penalties.**
>
> **(a) Failure to file returns, submit information or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to addition to other penalties provided by law, be

guilty of a misdemeanor and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution.

(c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code.

4. Section 145(c), just quoted, was repealed by Section 4(a) of the Act of August 27, 1949, c. 517, 63 Stat. 668, and the following provision of the Internal Revenue Code was enacted in its stead:

Sec. 3809. Verification of Returns; Penalties of Perjury.

(a) Penalties.—Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of purjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

5. Section 1430 of Title 26, United States Code, provides:

§ 1430. Other laws applicable

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700

[tax on pistols and revolvers; penalty in 26 U. S. C. 2707, *infra*, pp. 28-29] or section 1800 [tax on documents, etc.; penalties in 26 U. S. C. 1820-1823], and the provisions of section 3661 [enforcement of liability for taxes collected], shall, insofar as applicable and not inconsistent with the provisions of this subchapter [Employment Taxes; Employment by others than carriers], be applicable with respect to the taxes imposed by this subchapter.

6. Section 1622 of Title 26, United States Code, provides in pertinent part as follows:

§ 1622. Income tax collected at source

(a) Requirement of withholding. Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to 15 per centum of the amount by which the wages exceed the number of withholding exemptions claimed multiplied by the amount of one such exemption as shown in subsection (b) (1).

* * * * *

7. Section 1627 of Title 26 United States Code, provides:

§ 1627. Other laws applicable

* * * * *

All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 [Employment taxes; tax on employees] shall, insofar as applicable and not inconsistent with the provisions of this subchapter [Employment Taxes; Collection of income tax at source on wages], be applicable with respect to the tax under this subchapter.

8. Section 2707 of Title 26, United States Code, incorporated by reference in 26 U. S. C. 1430, *supra*, pp. 27-28, provides in pertinent part:

§ 2707. Penalties

* * * * *

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any

records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

9. The pertinent portions of 26 C. F. R. 402, Employment Taxes, provide:

402.601 Tax and Information Returns

Every employer shall make a tax and information return on Form SS-1a for the first quarter after December 31, 1939, within which wages are paid to his employee or employees, and for each subsequent quarter (whether or not wages are paid therein) until he files a final return as required by the provisions of Section 402.603. For quarters commencing after December 31, 1949 Form 941 shall be used in lieu of Form SS-1a. One original return shall be filed with the collector. For purposes of returns under the Act, the quarters shall each be three calendar months as follows: (1) from January 1 to March 31, both dates inclusive; (2) from April 1 to June 30, both dates inclusive; (3) from July 1 to September 30, both dates inclusive; and (4) from October 1 to December 31, both dates inclusive.

405.601 RETURN AND PAYMENT OF INCOME TAX WITHHELD ON WAGES.

Except as provided in 405.602 every person required, under the provisions of section 1622, I. R. C. to deduct and withhold the tax on wages shall make a return and pay such tax on or before the last day of the month following the close of each of the quarters ended March 31, June 30, September 30, and December 31. Such return is to be made on Form W-1, Return of Income Tax withheld on Wages, and must be filed with the collector of internal revenue for the district in which is located the principal place of business or office of the employer, or if he has no principal place of business or office, then in the district in which is located his legal residence. For quarters commencing after December 31, 1949 Form 941 shall be used in lieu of Form W-1. The return on Form 941 must be filed with the collector of Internal Revenue for the district in which is located the principal place of business of the employer. * * *

402.609—RECORDS—(a) RECORDS OF EMPLOYER.

(1) Every employer liable for tax shall keep accurate records of all remuneration (Whether paid in cash or in a medium other than cash) paid to his employees after December 31, 1939. * * *

10. Section 29.54-1 of Treasury Regulations 111 provide in part as follows:

* * * The books or records required by this section shall be kept at all times available for inspection by internal revenue officers. * * *

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case was before this Court once before as No. 586, October Term, 1950, on petition by Greenberg for a writ of certiorari to the United States Court of Appeals for the Third Circuit. On June 4, 1951, this Court granted the petition and by a per curiam decision, 341 U.S. 944, vacated the judgment of the Court of Appeals and remanded the case to that court for reconsideration in the light of *Hoffman* v. *United States*, 341 U.S. 479.

On November 15, 1951, in accordance with this mandate the Court of Appeals filed an opinion stating that it found no reason to alter its earlier conclusions (R. 245-248).

The present petition for certiorari raises all of the questions presented in the earlier petition and in addition makes the additional contention that the decision below on remand does not properly apply the decision of this Court in *Hoffman* v. *United States*. This brief will be limited to a discussion of the issues raised by this Court's *Hoffman* decision. The Court is respectfully referred to respondent's brief in opposition in No. 586, last term, for a discussion of the other issues. Since the facts are fully stated in the earlier brief, only such facts are repeated here as are necessary to the present argument.

STATEMENT

Petitioner has been convicted of contempt of court for refusal to answer three questions put to him by a grand jury. The first, which we shall refer to as the identification question, and which can be understood only in context of an immediately preceding question, was as follows (see R. 5-6):

> Q. Do you know any numbers writers around there (1133 West Diamond Street) men who are in the numbers business?
>
> A. Yes.
>
> 1. Q. Who?

A. [After consultation with counsel] I refuse to answer this question because it will incriminate me * * *.

The second and third, which we shall refer to as the telephone questions, in necessary context, were as follows:

Q. Do you make regular calls from that telephone [at 1133 West Diamond Street], since 1950?

A. Yes.

Q. Do you use that phone in connection with your business?

* * * * *

A. Not for my lawful business.

2. Q. Do you use it for any other business?

A. Well, I refuse to answer the question because it will incriminate me and I stand on my Constitutional rights * * *.

* * * * *

Q. Is it your real estate business you use it for?

A. No.

3. Q. What business do you use it for?

A. I refuse to answer the question because the answer will incriminate me. I stand on my Constitutional rights.

Somewhat later, in a hearing before the District Court, Greenberg read what purported to be a full statement of the basis of his claim of privilege. It appears at pages 131-132 of the Record and reads as follows:

* * * the reason why I have refused to answer certain of the many questions put to me * * * before the Grand Jury is because my answers to these questions will incriminate me in a violation of federal criminal statutes, among which would be the violation of the Internal Revenue laws, and particularly 26 U.S.C.A., Section 145(a), (b) and (c), as well as 26 U.S.C.A., Section 1625(a) and 26 U.S. C.A., Section 1626(a), (b) and (c).

In my income tax returns for the year immediately preceding 1950 I have stated a certain local business in which I was engaged. In addition thereto, I have listed other income under the heading of "Miscellaneous". Were I to answer with respect to those years immediately preceding 1950, that I was engaged in another business, I would tend to incriminate myself with respect to the statutes and the section hereof that I have just mentioned. Were I to admit that I was in another business, lawful or unlawful, in these previous years, for which I have filed a return, I would be incriminating myself. Were I to admit that I was in another business that had a gross income from which there would have been deducted gross expenditures, including payment of employees, Your Honor, I would be incriminating myself. These incriminations would be with respect to these violations of the Federal Income Tax laws.

* * * with reference to the year of 1950, it is true that I have not yet filed my return for that year, and need not until March of

1951. But * * * if I were to answer those questions which I have refused to answer, I will tend to incriminate myself of violations of the Federal Income Tax laws of the sections hereinabove referred to * * *. [If] I admitted that I had a business other than the business that I have mentioned to the Grand Jury, if I admit that in that business I had employees, then I know that my answer will tend to incriminate me in the violation of Sections 1625(a), 1626(a), (b) and (c), as well as Sections 145(a), (b) and (c) above referred to. Were I to admit that I had no records and kept no account of my other business, lawful or unlawful, other than the business testified to, I would be incriminating myself in a violation of the Federal Income Tax laws. I know that if I admitted being in any other business, lawful or unlawful, and had employees in the operation of that business, and/or if I admitted that I did not withhold the tax due to the United States Government, I would be incriminating myself not only in violation of the income tax laws which I have enumerated above, but that I may tend to incriminate myself with regard to conspiracy charges in connection therewith. I also believe that answering the questions which I have refused to answer may tend to incriminate me in violation of the False Statements Statute * * *.

Thus Greenberg contends that disclosure that he is in business would (1) tend to show he has

employees and therefore tend to establish one component of the crime of failure to file withholding and social security tax returns;[1] (2) tend to prove that he was previously engaged in some business as to which, if the proceeds had not been reflected in his records or returns, he could not answer any question without incriminating him-

---

[1] Section 2707 of the Internal Revenue Code provides:

"(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who wilfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

"(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

The duty to withhold and pay social security taxes is imposed by Sections 1400 and 1401(a) and the penal provisions made applicable by Section 1430.

The duty to withhold income taxes is imposed by Section 1622(a). Pertinent provision in the Regulations relating to Employment Taxes and to Withholding Taxes require return and payment quarterly. 26 C.F.R. 402.601, 405.601. They also require the employer to keep accurate records of all remuneration paid to his employees. 26 C.F.R. 402.609.

self under Sections 145(c) (now 3809(a)) of the Internal Revenue Code.[2]

It will be observed that neither of these objections has anything to do with the identification question. And, so far as we have been able to determine, no basis for claim of privilege with respect to that question was offered. For this reason, the issues posed by that question will be dealt with separately.

ARGUMENT

This Court remanded the case to the Court of Appeals in order that it might apply the principles enunciated in the *Hoffman* case to the facts here involved.

The *Hoffman* case emphasizes the importance of being alert to repress abuse of the investigatory power and, reasserts the doctrine that not only the disclosure of a complete crime, or an element thereof, but also the disclosure of a "link in the chain of evidence" is sufficient to sustain a claim of privilege against self-incrimination. (341 U.S. 486.) However, the Court also restated the limitation that the privilege should be available to a witness only when he has reasonable cause to apprehend danger and that his say-so is not of itself a sufficient basis for granting the privilege.

---

[2] Section 145(c) provides:

"Any individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony * * *."

The Court quoted with approval the language of Taft, J., in *Ex parte Irvine,* 74 Fed. 954, 960 (C.C. S.D. Ohio, 1896) stating that the trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."

The question raised on this petition is whether or not the court below properly applied these principles to the facts in the case before it. In considering this aspect of the question, it is convenient to consider first the questions dealing with the nature of the witness's business and then the question relating to the identity of the numbers writers.

There is a superficial similarity between the questions dealing with the use of the petitioner's telephone and the business questions in the *Hoffman* case. In *Hoffman,* the question directly asked for the nature of the witness's business. In this case that particular question is not now in issue, but the questions with respect to the use of the telephone come out at about the same place. However, the similarity is only superficial since in this case not only are there no circumstances indicating a likelihood that the petitioner's business is illegal under federal law (a factor which was determinative in the *Hoffman* case), but the petitioner's entire explanation of his fear of answering indicates that he had no apprehension arising from the nature of his business as such. See pp. 4-5, *supra.* This approach is borne out by the petition

for certiorari, which attempts by the vigor of its language to span the gap between the information called for by the questions and the danger to the witness of being prosecuted for a federal offense by reason of his answer.

The witness asserts that he fears prosecution not because his business is illegal, but on the ground that his testimony could be used against him to prove that he had had employees, from whom he had not withheld income and social security taxes, and income, which he had not properly reported in his return. It is obvious that neither of these matters is directly connected with the nature of the witness's business. The only connection asserted by the petitioner is that it is established that some numbers operators employ help and that there is, therefore, a possibility that petitioner was such an operator and might have employed runners or record keepers. But this possibility does not justify the claim of privilege. Its usefulness to show guilt depends upon so many speculative suppositions that the danger to petitioner is negligible. To show guilt it must be assumed that the description of the numbers business is complete; that petitioner is in the numbers business; that he is a banker rather than a writer or a pickup man; that he is a banker with "employees"; that any "employees" he may have fall within the definition of employees embodied in the statutes involved, although it is common knowledge that the

relationships between persons in illegal business frequently are studiously distant and independent. Actually the petitioner appears not to have been so much afraid of the answers to the particular questions as to whether he was in the numbers business, as he was to the questions which he anticipated would follow with respect to whether or not he did have employees and whether or not he did have income. This fear cannot justify his refusal to answer the questions actually asked. The court below properly reached the conclusion that the danger from the answers to the particular questions asked was not sufficiently real to justify upholding the claim of privilege.

Turning to the question with respect to the identity of the numbers writers with whom the witness was acquainted, the similarity to the facts of the *Hoffman* case is even more remote. In the *Hoffman* case the witness freely admitted his long-standing acquaintance with William Weisberg and the question of privilege arose with respect to an attempt to locate Weisberg in connection with an outstanding subpoena. No such question is involved in the present case.

The petitioner attempts to rely on a decision of this Court in which a witness was asked as to the identity of certain officials of the local Communist organization. '*Patricia Blau* v. *United States,* 340 U.S. 159. The similarity of that case to the present one disappears when it is realized that the answer

was there held to be privileged by reason of the fact that it would disclose knowledge of the internal affairs of the Communist Party which, it was held, would serve as a link for prosecution for violation of the Smith Act. Obviously no comparable circumstances exist with reference to the disclosure of the names of numbers writers whom the witness has already admitted knowing.

Moreover, petitioner's apparently full statement of his reasons for refusing to answer the identification question indicates no reason why the disclosure of the names of the numbers writers would endanger him. The reasons stated are all related to the telephone questions. This fact alone would be enough to deny the privilege with respect to this question.

It is submitted that all that is involved in this case is the application of principles which have recently been reasserted by this Court in the *Hoffman* case to the particular facts in the case before the court. The court purported to apply these principles, and analysis of the facts indicates no error of judgment in this regard.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted.

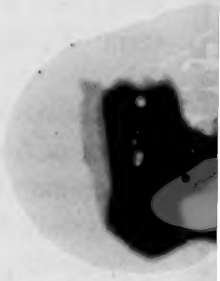
PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

JOHN F. DAVIS,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
JOHN R. WILKINS,
Attorneys.

JANUARY, 1952.



☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 952153 897

4

Office - Supreme Court, U. S.
FILED
JAN 18 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITIONER'S SUPPLEMENTAL MEMORANDUM.

This Memorandum is impelled by two material misstatements of fact in the Government's Brief in Opposition.

I. A. The Solicitor General says (Br. Op. 7),

> • • • so far as we have been able to determine, no [illegible] for claim of privilege with respect to that question [the identification question, "Who?"] was of-

[illegible]

. The record shows precisely the opposite.

(1) Petitioner gave a full statement of his reasons for refusing to answer all of the questions which remained unanswered, and that statement was, with the consent of the prosecutor, incorporated into the Grand Jury presentment.

See R. 178a, which refers to Question 8, the "Who?" question (R. 5a-6a).

(2) The full statement of petitioner's reasons for standing on his claim of privilege appears at R. 131a-132a and again at R. 174a-176a. A portion—but only a portion—of that statement is reproduced at Br. Op. 4-5. Here is the last paragraph of petitioner's statement, which, as just noted, was applied to the "Who?" question, but which the Solicitor General failed to include in his brief (R. 132a, 176a):

> My fear and apprehension that I would tend to incriminate myself is based upon not only that which I have read in the newspapers[1] but also upon the fact that Morton Witkin, Esq., of my counsel in whom I have great trust and confidence, has advised me that it is his honest and sincere opinion that were I to answer the questions referred to I would be incriminating myself. I believe that his advice is sound and I choose to rely upon it. May I say in conclusion that these two reasons are in addition to and not exclusive of my own inherent belief of self-incrimination due to the fact that I have knowledge of what my answers to the refused questions would be.

(3) Petitioner's comprehensive offer of proof at the trial (R. 48a-53a), which applied to all of the unanswered questions, disclosed additional reasons for his failure to answer.

---

[1] The newspaper accounts (R. 196a-197a), which were received in evidence at the trial (R. 56a), included the following:

> Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws, he [Goldschein] said.
>
> • • • •
>
> Income tax violations would permit the Government to strike indirectly at racketeers whose activities are not covered by Federal criminal statutes.

(4) After petitioner had been found guilty, and before sentence, his counsel said, *inter alia* (R. 66a):

> • • • in one of the three questions that we failed to answer, the question "Who", my argument *was* he would be giving the names of witnesses against himself • • •

We have italicized the past tense to show that the argument had been made earlier; it is not in record because the full transcript was not printed.

II. A. The Government's Brief in Opposition continues (Br. Op. 11):

> Moreover, petitioner's apparently full statement of his reasons for refusing to answer the identification question indicates no reason why the disclosure of the names of the numbers writers would endanger him. The reasons stated are all related to the telephone questions. This fact alone would be enough to deny the privilege with respect to this question.

B. The same inaccuracies and omissions already noted under item I permeate this excerpt also: Petitioner's reasons for refusing to answer included an apprehension of self-incrimination based upon the newspaper reports of the prosecutor's plan of reaching numbers operators through the federal tax laws; they included the advice of petitioner's counsel; and they included the fear that if he answered the question "Who?" he would be supplying the prosecutor with the names of witnesses against himself.

Respectfully submitted.

Frederick Bernays Wiener,
1009-1015 Tower Building,
Washington 5, D. C.,

Jacob Kossman,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

January 1952.

BRIEF FOR THE UNITED STATES

INDEX

Page

Opinions below 1

Jurisdiction 2

Questions presented 2

Constitutional provision and statutes and regulations involved..... 3

Statement 3

Summary of Argument 14

Argument:

I. There was No Real Danger That the Questions Which Petitioner Refused to Answer Would Have Incriminated Him 21

A. *The decisions of this Court establish that there must be a real, substantial danger of incrimination to justify the claim of privilege* 21

1. *The mere fact that an answer to a question may be admissible in evidence at a trial does not render it subject to the privilege* 22

2. *If evidence which is not sufficiently direct to be admissible at a trial is ever grounds for assertion of the privilege on the theory that it may furnish a clue leading to relevant evidence, the relationship between the clue and the apprehended danger must be very close* 27

B. *In determining whether a claimed answer would be incriminating as a link in the chain of evidence or as a clue to relevant evidence, great weight must be given to the decision of the District Court* 36

C. *Under no test of the privilege were the telephone-business question asked petitioner in this case incriminating*..... 42

D. *Under no test of the privilege were the identity questions incriminatory* 50

E. *If any question should have been answered the judgment should be sustained* 56

II. Whatever Variance There Might Have Been Between What the District Judge Orally Found and His Formal Written Judgment was Immaterial and did not Prejudice Petitioner 56

Page

III. The Record Shows That Petitioner Disobeyed Orders of the District Court in Connection With the Questions Here Involved 60

IV. Petitioner was not Entitled to Subpoena Either the Government's Records or the Grand Jury Minutes.... 62

Conclusion 82
Appendix 83

CITATIONS

Cases:

Abrams v. *United States*, 64 F. 2d 22.....55, 66
Alexander v. *United States*, 181 F. 2d 480..... 27
Arndstein v. *McCarthy*, 254 U.S. 71 29
Ballmann v. *Fagin*, 200 U.S. 186 29
Blau v. *United States*, 340 U.S. 159 .....15, 17, 26, 52
Blau v. *United States*, 340 U.S. 332.....56, 59
Boske v. *Comingore*, 177 U.S. 459 79
Bowman Dairy Co. v. *United States*, 341 U.S. 214..... 70
Brady v. *Periodical Publishers' Service Bureau*, 173 F. 2d 776.. 44
Brown v. *Walker*, 161 U.S. 591 .....15, 23, 31
Counselman v. *Hitchcock*, 142 U.S. 547 .....15, 28, 30, 31, 65
Doran v. *United States*, 181 F. 2d 489..... 27
Estes v. *Potter*, 183 F. 2d 865, certiorari denied, 340 U.S. 920.. 27
Fleming v. *Bernardi*, 1 F.R.D. 624, 4 F.R.D. 270..... 79
Goodman v. *United States*, 108 F. 2d 516.....66, 77
Hale v. *Henkel*, 201 U.S. 43 66
Harwood v. *McMurtry*, 22 F. Supp. 572 79
Haynes, In re, 88 F. Supp. 379 46
Healey v. *United States*, 186 F. 2d 164..... 27
Heike v. *United States*, 227 U.S. 131.....23, 46, 66
Hirabayashi v. *United States*, 320 U.S. 81 .....56, 59
Hoffman v. *United States*, 341 U.S. 479
14, 15, 21, 22, 23, 26, 35, 36, 41, 45
Huttman, In re, 70 Fed. 699 79
Irvine, Ex parte, 74 Fed. 954 .....16, 39, 41, 46
Kasinowitz v. *United States*, 181 F. 2d 632..... 27
Lamberton, In re, 124 Fed. 446 79
Mason v. *United States*, 244 U.S. 362....14, 15, 16, 23, 24, 31, 39, 40, 66
Miller v. *Sanford*, 161 F. 2d 291, certiorari denied, 332 U.S. 774.. 58
National Labor Relations Board v. *Hearst Publications*, 322 U.S. 111 .....16, 44
New Deal Cab Co. v. *Fahs*, 174 F. 2d 318, certiorari denied, 338 U.S. 818 44
O'Connell v. *United States*, 40 F. 2d 201 .....16, 34, 50, 52, 56
Paddock v. *Siemoneit*, 147 Tex. 571, 218 S.W. 2d 428 46
Pinkerton v. *United States*, 328 U.S. 640.....56, 59

Page

Quarles and Butler, In re 158 U.S. 532 80
Rogers v. *United States*, 340 U.S. 367 49
Sackett, Ex parte, 74 F. 2d 922 79
Schmidt v. United States, 115 F. 2d 394 ..... 74, 76
Stegall v. *Thurman*, 175 Fed. 813 79
Smith v. *United States*, 337 U.S. 137 30
Tennessee Valley Authority, United States, ex rel. v. *Neal*, 45 F. Supp. 382 79
Touhy, United States ex rel. v. *Ragen*, 340 U.S. 462 79
United States v. *American Medical Association*, 26 F. Supp. 429 .. 74
United States v. *Andolschek*, 142 F. 2d 503 ..... 20, 71
United States v. *Beekman*, 155 F. 2d 580 71
United States v. *Burr* (*In re Willie*), 25 Fed. Cas. No. 14,— 692 ..... 14, 24, 30, 37, 65
United States v. *Cusson*, 132 F. 2d 413 ..... 16, 33
United States v. *Flegenheimer*, 82 F. 2d 751 .. 16, 17, 33, 34, 40, 49, 52
United States v. *Garsson*, 291 Fed. 646 80
United States v. *Girgenti* (C. A. 3, February 6, 1952) 46
United States v. *Grayson*, 166 F. 2d 863 71
United States v. *Hark*, 320 U.S. 531 ..... 19, 58
United States v. *Krulewitch*, 145 F. 2d 76 72
United States v. *Potts*, 57 F. Supp. 204 79
United States v. *Rosen*, 174 F. 2d 187, certiorari denied, 338 U.S. 851 35
United States v. *Sullivan*, 274 U.S. 259 ..... 47, 66
United States v. *Weinberg*, 65 F. 2d 394, certiorari denied, 290 U.S. 675 47
United States v. *Weisman*, 111 F. 2d 260 ..... 16, 17, 33, 35, 52
United States v. *Zwillman*, 108 F. 2d 802 ..... 20, 63, 72, 73
Vajtauer, United States ex rel. v. *Commissioner of Immigration*, 273 U.S. 103 ..... 16, 40
Vogel v. *Gruas*, 110 U.S. 311 80
Walling v. *Comet Carriers*, 3 F.R.D. 442 79
Watkins v. *Merry*, 106 F. 2d 360 58
Weeks, In re, 82 Fed. 729 79
Wertheimer v. *United States*, 179 F. 2d 559 27
Wilson v. *Bell*, 137 F. 2d 716 58
Worthington v. *Scribner*, 109 Mass. 487 80

CONSTITUTION, STATUTES AND REGULATIONS:

Constitution:

Fifth Amendment 59, 83
18 U.S.C. 401 ..... 57, 59, 83

Internal Revenue Code

Section 145(c) 83
1400 83

Page

1401 (a) ... 84
1430 ... 84
1622 (a) ... 84
1625 (a) ... 53, 84
1626 (a) ... 53, 85
1626 (b) ... 53, 85
1626 (c) ... 53
1627 ... 85
2707 ... 46, 86
5 U.S.C. 22 (R. S. 161) ... 78
26 C.F.R. 402.601 ... 87
26 C.F.R. 402.609 ... 88
26 C.F.R. 405.601 ... 87

MISCELLANEOUS:

Department of Justice Order No. 3229, 11 F. R. 4920, 11 F. R. No. 177, Part II, Page 177A-107 ... 78-79

Dession and Cohen, *The Inquisitorial Functions of Grand Juries*, 41 Yale L. J. 687 ... 66

Federal Rules of Criminal Procedure
Rule 1 ... 58
Rule 6(e) ... 67, 68

25 Op. Atty. Gen. 326 ... 79

29 Op. Atty. Gen. 555 ... 79

Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 ... 65

Webster's New International Dictionary (Merriam-Webster, 2d ed. 1951), p. 362 ... 44

8 Wigmore, *Evidence* (3d ed., 1940) § 2250 ... 65

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the Court of Appeals (R. 234-241) is reported at 187 F. 2d 35. The orders of this Court granting petitioner's previous petition for a writ of certiorari, vacating the judgment of the Court of Appeals, and remanding the case to that court for reconsideration (R. 242-244) are reported at 341 U. S. 944. The opinion of the Court of Appeals on remand (R. 245-247) is reported at 192 F. 2d 201.

JURISDICTION

The judgment of the Court of Appeals (R. 248) was entered on November 15, 1951. The petition for a writ of certiorari was filed December 4, 1951, and was granted January 28, 1952 (R. 249). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, a witness before a grand jury investigating violations of federal statutes, could lawfully refuse, on the asserted ground that his answers would tend to incriminate him under the federal social security and withholding tax laws, to answer questions disclosing his business and the names of number writers whom he admitted he knew.

2. Whether the formal judment adjudging petitioner guilty of contempt varied from the earlier oral finding of the court, and, if so, whether the formal judgment is controlling as to the basis of the finding of contempt.

3. Whether there was an order by the District Court that petitioner answer the questions he had refused to answer before the grand jury, and whether there was proof of his disobedience of such an order.

4. Whether the District Court erred in refusing petitioner access to the grand jury minutes and government files.

CONSTITUTIONAL PROVISION AND STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Constitution, statutes, and regulations are set out in the Appendix, *infra*, pp. 83-88.

STATEMENT

On September 14, 1950, a grand jury for the Eastern District of Pennsylvania began "an inquiry concerning frauds upon and conspiracies to defraud the Government of the United States, involving violations of the customs, narcotics, and internal revenue liquor laws of the United States, as well as violations of the White Slave Traffic Act, perjury, bribery, and other criminal laws of the United States, and conspiracy to commit all such offenses" (R. 2).[1] Petitioner was subpoenaed to appear as a witness before the grand jury on October 2, 1950, at which time he refused to answer certain questions, claiming that his answers might tend to incriminate him (R. 2). The refusal to answer three of these questions, which are italicized in the quotation below, forms the basis of this case. The first question, which we shall refer to as the identification question, and which can be understood only in context of an immediately preceding question, was as follows (see R. 5-6):

---

[1] Pages 1-201 of the Record are numbered therein as 1*a*-201*a*. References in this brief to such pages will not include the "*a*".

Q. Do you know any numbers writers around there (1133 West Diamond Street) men who are in the numbers business?

A. Yes.

1. Q. *Who?*

A. (After consultation with counsel) I refuse to answer this question because it will incriminate me * * *.

The second and third, which we shall refer to as the telephone questions, in necessary context, were as follows:

Q. Do you make regular calls from that telephone (at 1133 West Diamond Street), since 1950?

A. Yes.

Q. Do you use that phone in connection with your business?

* * * * * * * *

A. Not for my lawful business.

2. Q. *Do you use it for any other business?*

A. Well, I refuse to answer the question because it will incriminate me and I stand on my Constitutional rights * * *.

* * * * * * * *

Q. Is it your real estate business you use it for?

A. No.

3. Q. *What business do you use it for?*

A. I refuse to answer the question because my answer will incriminate me. I stand on my Constitutional rights.

On October 9, the Government requested the District Court to instruct petitioner to answer the questions (R. 2, 203, 204.) On that date a hearing, at which petitioner was present with counsel (R. 2, 203-204), was held upon his claim of privilege (R. 2, 71-99, 198, 203-205). And on October 16, the court, after hearing further argument of counsel, found that there was no real and substantial danger that the answers to the questions would incriminate petitioner of a federal crime, and ordered him to return before the grand jury and answer them (R. 2, 198). On October 17, petitioner was recalled as a witness before the grand jury and again refused to answer the questions italicized above (R. 3, 198-199). Extensive hearings before the court on petitioner's claim of privilege, consisting primarily of argument by counsel, followed on October 17-20, 23, 30 and 31,[3] at which he was again represented by the same counsel.

---

[3] The complete transcript of these hearings is not included in the printed record. The parts included are at the following pages: October 9: R. 203-205; 71-95; 215-216; 95-99. October 17: R. 99-102. October 18: R. 102-109. October 19: R. 109-112. October 20: R. 112-115; 205-207, 115-117; 216-220; 117-118; 220-222; 207-209, 222-223, 118-119; 223, 119-120, 209, 223-230; 120-121. October 23: R. 121-143; 209 (last line)-212; 143-145. October 30: R. 230-233; 145-148. October 31: R. 149-157.

At one of these hearings, on October 23, petitioner testified in substance that he refused to answer the questions because the answers would incriminate him under the internal revenue laws; that he stated in his 1949 income tax return that he was engaged in a certain local business [*i. e.*, real estate] and listed other income under "Miscellaneous"; and that his apprehension that his answers to the questions would tend to incriminate him was based on what he had read in the newspapers, his counsel's advice, and his own knowledge of what his answers would be (R. 130-132).[3]

---

[3] The full statement made by petitioner (R. 131-132) was as follows:

> If Your Honor pleases, the reason why I have refused to answer certain of the many questions put to me by Mr. Goldschein before the Grand Jury is because my answers to these questions will incriminate me in a violation of federal criminal statutes, among which would be the violation of the Internal Revenue laws, and particularly 26 U. S. C. A., Section 145(a), (b) and (c), as well as 26 U. S. C. A., Section 1625(a) and 26 U. S. C. A., Section 1626(a), (b) and (c).
>
> In my income tax returns for the year immediately preceding 1950 I have stated a certain local business in which I was engaged. In addition thereto, I have listed other income under the heading of "Miscellaneous." Were I to answer with respect to those years immediately preceding 1950, that I was engaged in another business, I would tend to incriminate myself with respect to the statutes and the sections hereof that I have just mentioned. Were I to admit that I was in another business, lawful or unlawful, in these previous years, for which I have filed a return, I would be incriminating myself. Were I to admit that I was in another business that had

Petitioner's counsel also stated that, based upon information given him by petitioner and his own knowledge of the law, it was his opinion that the answers would incriminate petitioner (R. 143).

On October 30, petitioner again appeared with counsel before the court, which "again found that there was no real and substantial danger of in-

---

a gross income from which there would have been deducted gross expenditures, including payment of employees, Your Honor, I would be incriminating myself. These incriminations would be with respect to these violations of the Federal Income Tax laws.

Now, may it please Your Honor, with reference to the year of 1950, it is true that I have not yet filed my return for that year, and need not until March of 1951. But, may it please Your Honor, if I were to answer those questions which I have refused to answer, I will tend to incriminate myself of violations of the Federal Income Tax laws of the sections hereinabove referred to, and argued at length by my attorney on Friday last. May it please Your Honor, if I admitted that I had a business other than the business that I have mentioned to the Grand Jury, if I admit that in that business I had employees, then I know that my answer will tend to incriminate me in the violation of Sections 1625(a), 1626(a), (b) and (c), as well as Sections 145(a), (b) and (c) above referred to. Were I to admit that I had no records and kept no account of my other business, lawful or unlawful, other than the business testified to, I would be incriminating myself in a violation of the Federal Income Tax laws. I know that if I admitted being in any other business lawful or unlawful, and had employees in the operation of that business, and/or if I admitted that I did not withhold the tax due to the United States Government, I would be incriminating myself not only in violation of the income tax laws which I have enumerated above, but that I may tend to incriminate myself with regard to

crimination for the violation of a Federal statute * * * and ordered him to return before the Grand Jury and answer" the questions which he had refused to answer (R. 199; see also R. 4, 146, 231-232). Later that day petitioner was recalled before the grand jury, where he again refused to answer the questions (R. 6-8, 10-14, 199-201).

On November 1, the grand jury filed a presentment with the court (R. 2-9) which, as later

---

conspiracy charges in connection therewith. I also believe that answering the questions which I have refused to answer may tend to incriminate me in violation of the False Statements Statute of the Federal Criminal Code.

My fear and apprehension that I would tend to incriminate myself is based upon not only that which I have read in the newspapers but also upon the fact that Morton Witkin, Esq., of my counsel in whom I have real great trust and confidence, has advised me that it is his honest and sincere opinion that were I to answer the questions referred to I would be incriminating myself. I believe that his advice is sound and I choose to rely upon it. May I say in conclusion that these two reasons are in addition to and not exclusive of my own inherent belief of self-incrimination due to the fact that I have knowledge of what my answers to the refused questions would be.

The newspaper accounts referred to by petitioner (R. 196-197, and see R. 56) stated that the Department of Justice was opening a "racket probe" in Philadelphia; that all forms of crime were to be investigated by a federal grand jury; and that the investigation conducted by the special agents working under Mr. Goldschein would, he indicated, "extend to rackets in all their ramifications". He was further reported as having said that "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws."

amended (R. 170-180), charged, *inter alia,* that petitioner had been ordered by the court on October 30 to answer before the grand jury, and later that day had refused to answer, the questions italicized in the quotation on pp. 4-5, *supra.* The presentment further charged that petitioner, by refusing to answer the questions, had (1) "willfully, deliberately and contumaciously shut off and blocked the search for truth, thwarted the investigation of this Grand Jury in the matter hereinbefore set out, and obstructed the administration of justice," and (2) had "willfully, deliberately and contumaciously disobeyed and resisted the lawful order and command of this Honorable Court by willfully and deliberately refusing to obey the Order of this Court to answer before the Grand Jury the aforesaid questions" (R. 8, 199-201).

At petitioner's trial for contempt on November 3, petitioner introduced as evidence certain pages of the transcript of the earlier hearings (R. 14-15, 71-195). A certified public accountant who was a tax expert testified that if petitioner during 1950 was engaged in an unlawful business or in the numbers business and had employees in such business who were not exempt, he would have been obligated under the internal revenue laws and the Federal Insurance Contributions Act to have made withholding deductions from the employees' wages and to have made quarterly returns of such deductions to the Collector of Internal Revenue

(R. 18-30). Petitioner testified that he had not filed any withholding tax returns during 1950 (R. 37), and he introduced a statement he had made before the grand jury that "in the number business there are bankers" and "people who work for the bankers; who, among other duties, compute the records as turned in by the pickup men and the number writers" (R. 25-26).[4]

Petitioner also moved for a ruling on a subpoena *duces tecum* which he had on October 17 served on the government attorney in charge of the grand jury investigation, Mr. Goldschein, to produce all government records and grand jury minutes concerning the investigation of, and containing information about, petitioner. The Government had resisted the demand (R. 100) and filed a motion to quash the subpoena. The district court at various times (October 19: R. 111; October 31: R. 150-151; November 1: R. 190) prior to the contempt trial had ruled that it would not permit the disclosure sought unless petitioner made some initial showing that the questions might be dangerous to him. The petitioner's renewed request at the trial was again rejected on the same ground (R. 53).

Petitioner also called Mr. Goldschein as a witness and offered to prove that petitioner answered almost all of hundreds of questions asked him before the grand jury; that petitioner was being

---

[4] Petitioner was not cross-examined on his testimony (R. 37-45).

investigated by the Government and before the grand jury; that other witnesses before the grand jury had been asked questions concerning petitioner; that the answers to these questions which he refused to answer were known by the Government; that the Government already had information "which would definitely establish the unlawful business" of petitioner; that Mr. Goldschein had made statements to the press as reported in newspaper articles which showed that there was a definite plan on the part of the Government to prosecute petitioner for violation of the federal income tax laws (R. 48-53). The Government's objection to this offer of proof was sustained, as follows (R. 52-53):

> Mr. O'Keefe [Government counsel]. If the Court please I think we can boil these points that he has down to about three. First, he wants Mr. Goldschein to reveal to him and in open court the transactions of the Grand Jury, which is not permissible, as Your Honor knows. He wants to show by his second point that the motion that Your Honor has under consideration now, namely that he produce his records, he wants to show by that whether or not he has a case or can present a case before the Grand Jury for violation of a Federal statute, what the evidence is that he has, and thirdly on that point he is making or will attempt to make Mr. Goldschein show all the

> evidence that the Government has, if they do have any, and we certainly don't admit one way or the other that they have sufficient evidence to put before the Grand Jury to make a case on this man.
>
> * * * * * * * *
>
> The Court. All right, the objection is sustained. The Court so holds as to each and every one of the offers seriatim. The motion with respect to quashing the subpoena duces tecum is still held under advisement until proper showing is made.

Several days later, November 8, petitioner was called to the bar of the court and it "adjudge[d]" him "in contempt of court," but informed him that the court was "now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer," to which petitioner's counsel replied, "We take the same position we have taken before" (R. 65). After a plea by petitioner's counsel for leniency, the court sentenced petitioner to five months' imprisonment and admitted him to bail pending appeal (R. 71). A notice of appeal was filed the same day (R. 1). On November 10, the court entered its formal judgment (R. 198-201) adjudging petitioner "guilty of a contempt of this Court by a forcible resistance to a lawful Order thereof," i.e., in refusing to answer the questions, "Who,"

"Do you use it for any other business," and "What business do you use it for," quoted above.

The Court of Appeals affirmed the conviction (R. 234-241), holding *inter alia*, that "the district court based the finding of contempt solely upon the appellant's refusal to answer" the three questions mentioned in the formal judgment (R. 236).[5] Petitioner thereupon filed a petition for certiorari in this Court. On June 4, 1951, this Court granted the petition, and vacated the judgment of the Court of Appeals and remanded the case to that court for reconsideration in light of *Hoffman* v. *United States*, decided May 28, 1951 (R. 243-244). After reargument and reconsideration, the Court of Appeals found no reason to change its earlier views (R. 245-248) and again affirmed the judgment of the District Court (R. 248). A second petition for certiorari, filed December 4, 1951, was granted January 28, 1952 (R. 249).

---

[5] The Court of Appeals noted in its first opinion that the district court did not rule on the question "Are you in the numbers business now?" and therefore concluded that the problem of the incriminatory character of the question was not before it on appeal (R. 236). Petitioner suggests (Pet. 18-19) that the Court of Appeals considered this question on remand and held it nonincriminatory. He urges that if the question was not before the court on the first appeal, there was no way that it could have come before it on the remand from this Court. However, we can find nothing in the Court of Appeals' second opinion which suggests that it did in fact pass upon the incriminatory character of this question (R. 245-248), and the Government does not rely upon petitioner's refusal to answer it as a basis for supporting the judgment below.

SUMMARY OF ARGUMENT

I

A. The controlling principles with respect to the privilege against self-incrimination were recently stated by this Court in *Hoffman* v. *United States,* 341 U.S. 479. That case reasserts the doctrine that not only the disclosure of a complete crime, or an element thereof, but also the disclosure of a "link in the chain of evidence needed to prosecute the claimant for a federal crime" is sufficient to sustain a claim of privilege against self-incrimination (341 U.S. 486). However, the Court also restated the limitation that the privilege should be available to a witness only when he has reasonable cause to apprehend danger and that his say-so is not of itself a sufficient basis for granting the privilege.

The *Hoffman* case leaves open the questions: how strong a link must the answer be; whether the answer must be a link in the evidence admissible at trial, or whether it is barred if the answer would be merely a clue that might possibly lead to evidence that could be used at a trial.

1. The mere fact that evidence may be admissible at the trial does not suffice to justify a refusal to make disclosure. Rather, the answer must be evidence of substantial probative value. *Mason* v. *United States,* 244 U.S. 362; *United States* v. *Burr* (*In re Willie*), 25 Fed. Cas. No. 14,692e, p. 38 (C.C. D.Va.). The recent decisions in *Hoffman* v.

United States, supra, and *Blau* v. *United States,* 340 U.S. 159, have not altered this rule.

2. The cases also indicate that this Court has never held that it was a sufficient ground to refuse to answer a question that the answer may disclose clues which might lead to the discovery of evidence which would sustain a prosecution. *Counselman* v. *Hitchcock,* 142 U.S. 547, 564, held only that a statute providing that evidence obtained from a party could not "be given in evidence, or in any manner used against him" in a criminal or forfeiture proceeding was unconstitutional. Because the Court thought that the evidence given might be used to search out other evidence whose introduction was not proscribed, the immunity was not a complete substitute for the constitutional privilege, and therefore did not suffice. But the evidence in the case was in fact directly incriminating. Hence that case is not a holding that the privilege covered all evidence which might be useful to provide clues. And see *Brown* v. *Walker,* 161 U.S. 591, 600; *Mason* v. *United States, supra;* and compare *Hoffman* v. *United States, supra,* and *Blau* v. *United States.*

Even if the constitutional privilege has application to protect witnesses from having to disclose "clues," however, there still must be real danger of crimination. A series of cases in the Second Circuit, which has taken a broad approach to the privilege, indicate the great degree of danger re-

quired. *United States* v. *Cusson*, 132 F. 2d 413; *United States* v. *Weisman*, 111 F. 2d 260; *United States* v. *Flegenheimer*, 82 F. 2d 751; *O'Connell* v. *United States*, 40 F. 2d 201.

B. This Court has also indicated on numerous occasions that the judgment of the District Court in evaluating the danger of a claim in light of all the relevant circumstances is entitled to great weight. See *Mason* v. *United States*, *supra*, at 366; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113; cf. *Ex parte Irvine*, 74 Fed. 954, 960 (S.D. Ohio). While it is true that the *Hoffman* case, *supra*, did overrule the determination of the District Court in that case, it did not suggest any modification of the rule of great deference to the trial judge's decision.

C. Application of the above principles of law to this case shows that there is no real danger here. The admission by petitioner that he is in the numbers business has no significant tendency to show that he is an employer in that business. He might be and he might not be. The court should consider the fact that even if people work for petitioner in the numbers business they might not be "employees." Cf. *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111. The danger feared by petitioner is not from the disclosure that he is in the numbers business, but from prospective, as yet unasked, questions he fears will

follow. Such contingent fears cannot justify invocation of the privilege.

There can be no income tax liability arising from answers to the telephone questions (1) because it is not shown to be a willful misstatement of a material fact to classify income as "miscellaneous," and (2) so far as petitioner is disturbed about a disclosure of additional income, the objection relates to questions not yet asked.

D. Petitioner does not contend that a disclosure of names of numbers writers known to him around 1133 West Diamond Street could amount to a direct admission of crime. He argues instead that the answer to the question would amount to a "link in the chain of evidence" against him. But it is evident that the admission itself that he knew numbers writers would be too neutral to be dangerous. See *United States* v. *Flegenheimer, supra; O'Connell* v. *United States, supra.* There are here none of the special circumstances that might have made knowledge dangerous as in *Blau* v. *United States, supra,* where the matter concerned a clandestine, conspiratorial association. Cf. *United States* v. *Weisman,* 111 F. 2d 260 (C.A. 2).

Although petitioner disclaims the necessity of relying on the incriminatory possibilities of the identity question as a clue to evidence, rather than as evidence itself, it seems to us a more plausible position, if there is any such basis for the privilege.

However, we note that the petitioner never made claim, under oath, that this was the basis for his fear and, we therefore see no reason for recognizing it.

The claim is insufficient in any event because the danger, in light of the cases on the necessity for real danger, is insufficient. Petitioner flatly refused to disclose the names of any number writers around 1133 West Diamond Street, although, on the record, it is perfectly obvious that not all of them would be his employees. Consequently, petitioner's position must be read to claim the right to refuse to disclose the names of those whose knowledge of facts which may criminate him is wholly fortuitous. The gap between the admission and crime is too great.

E. Finally, it should be noted that the judgment should be affirmed if any one of the questions should have been answered, as the sentence of contempt was a general sentence.

II

Petitioner contends that, because the formal judgment omitted any reference to the charge in the presentment that he refused to answer the question, "Are you in the numbers business now?," and because it failed to find him guilty of obstruction of justice, it varied from the District Court's oral pronouncement of judgment and was therefore void. *Prima facie,* the formal judgment is

controlling. *United States* v. *Hark*, 320 U.S. 531, 534-535. Whatever ambiguity there may have been in the oral judgment was resolved by the formal judgment. Moreover, the formal judgment was, if at variance, at least more favorable to petitioner.

No importance can be attached to the failure to deal with one of the questions asked because the issues with respect to that question were embraced by the rulings on other questions.

III

Petitioner further contends that there was no proof of any disobedience of any order of court. Reference to the record will show that, on at least two occasions (R. 231, 146), the court ruled that petitioner would have to answer the questions now in issue. Further, petitioner admitted at the trial that he had refused to answer before the grand jury the questions set forth in the presentment (R. 10-14). When the court offered him an opportunity to purge himself by answering the questions, his counsel stated, "We take the same position we have taken before" (R. 65).

IV

Petitioner also contends that the judgment below should be reversed because he was denied access to grand jury minutes and government files containing matters relating to himself. He relies on

Second Circuit cases which suggest that a prosecution cannot be sustained if the defendant is denied the means for his defense. See, in particular, *United States* v. *Zwillman*, 108 F. 2d 802.

Petitioner's position was properly overruled. He made no such showing of danger as would permit examination of the minutes. (Rule 6(c) of the Federal Rules of Criminal Procedure makes the matter discretionary with the trial judge.) The inference is strong that petitioner wanted simply to embark on a "fishing expedition." Petitioner's position with respect to the Government's records stands essentially on the same footing.

The Second Circuit cases on which petitioner relies to support the proposition that the Government cannot prosecute while it denies the defendant an opportunity to defend do not justify an indiscriminate search of government files. They all relate to specific demands. See, e.g., *United States* v. *Andolschek*, 142 F. 2d 503.

More basic, however, is the fact that in evaluating the claim of privilege, the District Court takes into account the factors indicative of danger. Their actual presence or absence in the grand jury minutes is not then of much importance.

ARGUMENT

I

There Was No Real Danger That the Questions Which Petitioner Refused to Answer Would Have Incriminated Him

A. The Decisions of This Court Establish That There Must be a Real, Substantial Danger of Incrimination to Justify the Claim of Privilege.

The controlling principles with respect to the privilege against self-incrimination were stated by this Court in its recent decision in *Hoffman* v. *United States,* 341 U.S. 479, 486, as follows:

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (*Patricia*) *Blau* v. *United States,* 340 U.S. 159 (1950). But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason* v. *United States,* 244 U.S. 362, 365 (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers* v. *United States,* 340 U.S. 367 (1951), and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple* v. *Commonwealth,* 75 Va. 892, 899 (1881). * * *

One test to be used in deciding issues of privilege is thus made clear: Where there is any reasonable likelihood that an answer to a question would itself be a direct admission of crime or any element thereof, the claim of privilege must be sustained.

It is in respect to the answer which would "furnish a link in the chain of evidence needed to prosecute a claimant for a federal crime" that the *Hoffman* decision leaves open a number of questions which it was unnecessary in that case to reach. How strong, and how direct a link must the answer be? Must it be a link in the evidence admissible at the trial, or is the privilege applicable if the answer would be merely a clue that might lead possibly to evidence that could be used at a trial? Is any general rule applicable or must each case turn on its special facts? It is on the solution of these problems that the disposition of this case depends. Hence, before discussing the issues posed by the specific questions put to petitioner, we examine the standards which the prior decisions of this and other courts have laid down as guide-posts.

1. *The mere fact that an answer to a question may be admissible in evidence at a trial does not render it subject to the privilege.*—The decisions of this Court make it clear that the mere fact that the information obtained in answer to a question may be admissible evidence at a trial does not justify the claim of privilege. The danger from the answer must be real and substantial in a probative sense.

This Court, in the *Hoffman* decision, cited with approval *Mason* v. *United States,* 244 U.S. 362. There it was held, by a unanimous Court, that a witness would not expose himself to danger by admitting that an illegal game of cards was being played at a table where he was sitting. Manifestly, the fact that the witness was at the gaming table was a fact which would be admissible in evidence against him. The Court nevertheless found that the protection was "confined to real danger and does not extend to remote possibilities out of the ordinary course of law," citing *Heike* v. *United States,* 227 U.S. 131, 144,[6] and *Brown* v. *Walker,* 161 U.S. 591, 599, 600.[7] Otherwise stated, the Court found that the possible inference from petitioner's

---

[6] In this case the Court held that the witness was not immunized from prosecution because of certain grand jury testimony, for the reason that the testimony, not being within the scope of the privilege, could not be the basis of later immunity. In the earlier investigation the witness had presented certain tables showing the total amounts of sugar melted by his company. The substance of the subsequent criminal charge against the witness was that he had committed a fraud on the revenue by making entries of some of this sugar at less than its true weight. The Court, by Holmes, J., pointed out that the "mere fact that a part of the sugar embraced in the table was the sugar falsely weighed did not make the table evidence concerning the frauds." 227 U. S. at 143.

[7] In *Brown* v. *Walker,* although the point was not dwelt upon, the majority of the Court seems to have indicated that there could be no danger to an auditor in answering whether the company for which he worked had given improper rebates, where the statute imposed no personal liability on the auditor.

presence at the gaming table that he was actually engaged in gaming did not have sufficient evidential value to justify the claim of privilege.

In the *Mason* case, the Court cited *United States* v. *Burr* (*In re Willie*), 25 Fed. Cas. No. 14,692e, p. 38 (C.C. D.Va.), the first important American decision to deal with this problem. The case concerned a claim by Willie, who had been secretary to Aaron Burr, that he should not be required to answer whether he presently understood the code in which was written a letter dealing with Burr's allegedly treasonous activity, it being pointed out that if he knew of the treason and failed to disclose it, he was guilty of crime. Chief Justice Marshall defined the general rule of the "link in the chain of evidence" test, in words that have frequently been echoed in subsequent opinions, as follows, pp. 39-41:

> * * * Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction.

> That fact of itself might be unavailing, but all other facts without it would be insufficient. While that fact remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

In applying this test to the particular facts of that case, the court said:

> * * * But, on hearing the question more particularly and precisely stated, and finding that it refers only to the present knowledge of the cipher, it appears to the court that the question may be answered without implicating the witness, because his present knowledge would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial, or afford the means of providing that fact.

Obviously the fact of the witness's present knowledge of the cipher would have been a fact admissible at the trial. Yet that plainly was not the test which the Court applied; the test was the real probative value of such admissible evidence. One may disagree with the conclusion without rejecting the test.

The nature of the test is made clearer when considered in relation to the cases in which the privilege has been sustained.

Thus in the *Hoffman* case, the relationship between the answers which it was supposed that Hoffman would have to make to the so-called Weisberg questions, and the crimes for which he feared prosecution, was very close. Once it was assumed that Hoffman might have to disclose contacts between himself and Weisberg at a time when Weisberg was eluding a subpoena, and particularly, that he might have to disclose that Weisberg was hiding out at his premises or with his assistance, the relevance of such answers to proof of the crimes of obstruction or conspiracy was clear and direct, and not conjectural. It is true that there might be innocent explanations of such conduct. But on such answers alone, a jury would have been justified in making a finding against Hoffman. At the very least, the evidential value of the admissions would certainly be strong. Thus, in *Hoffman* the Court found a real, substantial danger of incrimination, not so much because the answers would have been admissible in evidence against him but because the *probative value* of such evidence was real and substantial.

Similarly this Court was dealing with evidence of real probative value when it held in *Blau* v. *United States,* 340 U.S. 159, that questions which called for answers admitting knowledge of the

organization, or whereabouts of the books, or employment by the Communist Party, might expose the petitioner to prosecution under the Smith Act. If Mrs. Blau possessed the kind of information about a clandestine and revolutionary organization which the questions asked her suggested, the likelihood that she was directly involved in activities illegal under the Smith Act was very strong. Her answers would not only have been admissible, they would have had real, and not merely remote or conjectural, probative value.[8]

2. *If evidence which is not sufficiently direct to be admissible at a trial is ever grounds for assertion of the privilege on the theory that it may furnish a clue leading to relevant evidence, the relationship between the clue and the apprehended danger must be very close.*

Petitioner suggests (Pet. 16) that the claim of privilege must be sustained if his answers "might lead to the discovery of evidence linking him with a violation of federal law or with a federal conspiracy, even though the answer to the particular

---

[8] While the language of some of the cases is broader than it needs to be, most of the cases dealing with the danger of incrimination under the Smith Act are consistent with this rationale. *Wertheimer* v. *United States*, 179 F. 2d 559 (C.A. 10); *Alexander* v. *United States*, 181 F. 2d 480 (C.A. 9); *Doran* v. *United States*, 181 F. 2d 489 (C.A. 9); *Kasinowitz* v. *United States*, 181 F. 2d 632 (C.A. 9); *Estes* v. *Potter*, 183 F. 2d 865 (C.A. 5), certiorari denied, 340 U.S. 920; *Healey* v. *United States*, 186 F. 2d 164 (C.A. 9).

question might not by itself incriminate him federally." In other words, it is claimed that, although the answer to a particular question may not even be sufficiently direct to be admissible at a trial, the privilege applies if the answer, although not a link in the "chain of evidence," is a link in a chain which may lead to evidence.

The source of this broad theory of the privilege is a dictum in *Counselman* v. *Hitchcock,* 142 U.S. 547, 564, in which this Court decided that an immunity statute, providing that evidence obtained from a party could not "be given in evidence, or in any manner used against him" in a criminal or forfeiture proceeding, did not confer an immunity as broad as the privilege, because the immunity statute "could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property." The Court said, at p. 585:

> * * * It is a reasonable construction * * * of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection, without using his answers as direct admissions against him."

This dictum was in substance repeated with respect to the same type of immunity statute in *Arndstein* v. *McCarthy*, 254 U.S. 71, 73. See also *Ballmann* v. *Fagin*, 200 U.S. 186, 195.

However, in the *Counselman* case, the questions, if answered, involved a direct admission of criminality since the witness was asked if a company of which he was an officer had received illegal rebates, and officers of such companies were subject to prosecution. In the *Arndstein* case the admissions sought would have shown that the witness had made false statements under oath in a bankruptcy schedule. Consequently, the questions asked would have come within the claim of privilege under the principles discussed in point A1 above. If, without reference to an immunity statute, the witness' claim of privilege were sustained, his answers would not be available to the prosecution, either as testimony, or as clues to other testimony. To compel the witness to answer, and then merely to exclude the answer at the trial, would not have restored the witness to the same position as he would have been in had he claimed the privilege prior to the immunity statute, since the statute left the prosecution free to use the answer to ferret out other evidence. The statute was thus, as the Court held, not as broad as a privilege.

A holding that an answer, clearly incriminating, cannot be used for any purpose, not even to ferret out information, is far different from a holding

that an answer, which in and of itself is not incriminating, becomes subject to the privilege because it may *possibly* be used to ferret out information.[9] That the Court in the *Counselman* case was making the former and not the latter holding, as petitioner argues, is we think, made clear by the citation with apparent approval of *United States* v. *Burr* (*In re Willie*) discussed *supra*. It quoted therefrom as follows (142 U.S. at 566):

> It would seem, then, that the court ought never to compel a witness to give an answer

---

[9] *Smith* v. *United States*, 337 U.S. 137, which has some language that seems to adopt a broad scale clue test, does not in fact do so. It was held there that a witness who had appeared in an OPA investigation pursuant to subpoena and disclosed data relating to the sale in the open market of goods obtained under a government priority could claim immunity from prosecution for intentional misuse of priority ratings and unlawful use of textiles obtained by such priorities. It is true that the Court at one point (p. 153) said: "Certainly many of these disclosures furnished leads that could have uncovered evidence of the unlawful conspiracy charged in the indictment." However, it is clear that the testimony included disclosures of specific and persuasive evidentiary value against the witness; and the Court had indeed earlier said (p. 148-149): "Some, at least, of the disclosures, such as the use of blanket priorities of Metals Disintegrating to procure textiles and the method of fixing prices on surplus sales, bore directly on the subsequent charges of misuse of priorities and the goods obtained thereby as well as the charge of conspiracy to violate the Price Control Act. The facts brought out • • • are not facts disassociated from his prosecution as in *Heike* v. *United States*, 227 U.S. 131, but in the language of the Compulsory Testimony Act are pertinent to the prosecution and 'concerning which' petitioner testified. The facts were links in the chain of evidence."

> *which discloses a fact that would form a necessary and essential part of a crime* which is punishable by the laws. [Emphasis supplied.]

The later decision in the *Mason* case further supports the view that *Counselman* was not intended to have the broad construction which has been assigned to it. It is impossible to reconcile the *Mason* case with the theory that a non-incriminatory answer is subject to the privilege merely because it may furnish a clue to other evidence. Certainly, the admission that one was sitting at a gambling table would be sufficient to furnish a clue to witnesses who might testify to the fact that the witness gambled.

Consequently, the apparent explanation for the holding is that the Court did not regard the *Counselman* decision as having the sweeping effect which is assigned to it.

While neither the *Hoffman* nor *Blau* decisions directly involved the point, it is significant that they speak in terms of link in the "chain of evidence," and not of links in a chain of clues to evidence.[10] We believe, therefore, that there is no

---

[10] See also *Brown* v. *Walker*, 161 U.S. 591, 600, where, in sustaining an immunity statute passed to answer the *Counselman* objection, this Court said:

> The danger of extending the principle announced in *Counselman* v. *Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some

authority to support petitioner's argument that even though the answer to a question is not in itself incriminating, it can still be the basis of a claim of privilege.

Even assuming, however, that it should be held that the privilege may be claimed on the ground that the answer, although not in itself incriminating, will furnish a clue to relevant evidence, it is clear that the relationship between the answer and the apprehended danger must be very real and very close. As was pointed out in point A1, *supra*, this Court has held that even evidence sufficiently relevant to be admissible at a trial is not subject to a claim of privilege unless the answer has real probative value. Manifestly, at least as rigid a standard must be applied where the answer is not directly relevant but at most can furnish a clue to evidence.

We cannot look to the decisions of this Court for illustrations of this principle for, as discussed above, this Court has never applied the theory that a mere clue is sufficient basis for invoking the privilege. The Court of Appeals for the Second Circuit, however, has adopted a test of the privilege which is akin to and embraces the posi-

---

third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege.

tion that answers which lead to evidence may be within the privilege. Without regard to whether the answer would or would not be admissible at a trial, that court has said "the question is always whether the danger to be apprehended from an answer is near enough to be real, or whether it is too remote to be substantial," *United States* v. *Cusson,* 132 F. 2d 413, 414, and "in the end we should say no more than that the chase must not get too hot, or the scent too fresh," *United States* v. *Weisman,* 111 F. 2d 260, 263. This concept of the privilege obviously includes non-incriminatory answers which lead to evidence, and at the same time suggests the standard by which such answers must be judged. The cases in the Second Circuit show that, to be subject to a claim of privilege, the relationship between the answer and the apprehended danger must be real, close, and direct.

The point is well illustrated by contrasting the decisions of that circuit in *United States* v. *Cusson, supra,* and *United States* v. *Flegenheimer,* 82 F. 2d 751 (C.A. 2). In the *Cusson* case, the court upheld the claim of privilege as to a question whether the witness had met "any of the Groves" during a visit to Philadelphia in February, 1941. It appeared that, at the time of her visit, two men named Groves were under indictment, that petitioner went to Mexico shortly before the Groves trial which took place soon after her visit and returned shortly after the conclusion of the trial, and that

the prosecutor had asked the witness whether she had been subpoenaed for the trial. The court sustained the claim that, in its setting, disclosure of a meeting with the Groves might serve as a link in establishing that they told her to go to Mexico to avoid being called as a witness, and that this would tend to prove that she had conspired to obstruct justice. On the other hand, in the *Flegenheimer* case, appellant, DiLarmi, had been called as a witness in the trial of Flegenheimer, under an indictment for evasion of income taxes, which alleged that the name Harmon was used as an alias by Flegenheimer, and that part of Flegenheimer's income was derived from a business for which a bank account was carried in the name of "Joseph Harmon and Rocco DeLarmi." DiLarmi claimed the privilege as to a question "Do you know Joseph Harmon?" The Court of Appeals upheld the refusal to recognize the claim, holding that if Harmon was an alias of Flegenheimer, an affirmative answer would have been no more than an admission that the witness knew the defendant. Even in the setting of a joint bank account in both names, the Court found that an admission of acquaintanceship would not be dangerous.

Similarly, in *O'Connell* v. *United States,* 40 F. 2d 201 (C.A. 2), involving a grand jury investigation of a lottery, the court rejected a claim of privilege to refuse to disclose whether the witness was acquainted with certain persons thought to be

connected with the lottery pool. It said that an answer of yes or no could have had no direct tendency to criminate the witness, apparently regard- it possible for the witness to explain such acquaintance innocently. On the other hand, in *United States* v. *Weisman,* 111 F. 2d 260, 263 (C.A. 2), the witness' refusal to answer whether he knew anyone who lived in Shanghai in the years from 1934 to 1939, or whether he received cables at a certain address, was upheld where it appeared that an indictment charging a conspiracy to import narcotics from China had been returned against others and that the Government had in Shanghai obtained copies of cables arranging for payment.

These cases, from the Court of Appeals which has adopted the broadest view of the scope of the privilege, illustrate that, even under so broad an approach, the "protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer" (*Hoffman* v. *United States,* 341 U.S. at p. 486), and that the danger must, in its setting, be substantial.[11]

---

[11] The recent decision of the Second Circuit in *United States* v. *Rosen,* 174 F. 2d 187, certiorari denied, 338 U.S. 851, while representing a broad interpretation of this rule, is not a departure therefrom. The court found that, in the particular circumstances, questions as to Rosen's connection with a car formerly owned by Alger Hiss, might have connected him with a conspiracy to commit espionage.

B. In Determining Whether a Claimed Answer Would be Incriminating as a Link in the Chain of Evidence or as a Clue to Relevant Evidence, Great Weight Must be Given to the Decision of the District Court.

As appears from the discussion in point A, by whatever test the privilege of self-incrimination must be judged, there must be a finding of real, substantial danger to the witness from the answer. And the cases make it clear that, as this Court said in the *Hoffman* case, at p. 486:

> * * * The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified * * *.

In dealing with this situation of possible danger from an answer, two different questions may be involved. One is whether the witness is likely to give a particular answer which would be incriminating; the other is whether the possible answer, once it is assumed that the witness might have to give it, is such as to represent a danger to him.

Thus, if a witness is asked, "What is your business?", as was Hoffman, the claim of privilege involves speculation as to the answer. It is possible, as this Court pointed out in the *Hoffman* case, that a true answer would be that the witness is in a business involving evasion of federal laws. In that event, the mere assertion of the privilege must be given weight, and almost any circumstance

showing that the witness might give such an answer requires sustaining the claim of privilege. A very different situation, however, is present where the possible answers are limited. Thus, if a witness is asked "Are you in the numbers business?" his only possible answers are "yes" or "no." Neither answer would directly implicate the witness in a federal crime. Then the question is whether either answer could be a danger to the witness under the tests discussed above. It is then that the court must look at all the circumstances to determine not the possibility that a particular answer will be made, but to determine the reality of the danger from a particular answer, *assuming* that it will be made.

Chief Justice Marshall in the *Burr* case, *supra,* at pp. 39, 40 pointed out this distinction as follows:

> It is a settled maxim of law that no man is bound to criminate himself. This maxim forms one exception to the general rule, which declares that every person is compellable to bear testimony in a court of justice. For the witness who considers himself as being within this exception it is alleged that he is, and from the nature of things must be, the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question if he will say upon his oath that his answer to that question might criminate himself.

When this opinion was first suggested, the court conceived the principle laid down at the bar to be too broad, and therefore required that authorities in support of it might be adduced. Authorities have been adduced, and have been considered. *In all of them the court could perceive that an answer to the question propounded might criminate the witness, and he was informed that he was at liberty to refuse an answer.* These cases do not appear to the court to support the principle laid down by the counsel for the witness in the full latitude in which they have stated it. *There is no distinction which takes from the court the right to consider and decide whether any direct answer to the question propounded could be reasonably supposed to affect the witness.* There may be questions no direct answer to which could, in any degree, affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. * * *

* * * * * * * *

When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would

> be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily then * * * that if the question be * * * such * * * that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. * * * But, on hearing the question more particularly and precisely stated, and finding that it refers only to the present knowledge of the cipher, it appears to the court that the question may be answered without implicating the witness, because his present knowledge would not, it is believed, in a criminal prosecution, justify the inference that his knowledge was acquired previous to this trial, or afford the means of proving that fact. [Emphasis added.]

This was the reasoning applied by this Court in the *Mason* case when it held that a question as to whether the witness was present at a gambling table must be answered. The only possible answers were "yes" or "no." And the Court decided that neither answer would be incriminating. See also the decision by Judge Taft in *Ex parte Irvine,* 74 Fed. 954, 960-965 (C.C. S.D. Ohio) and the de-

cisions by the Second Circuit in *United States* v. *Flegenheimer* and *O'Connell* v. *United States,* discussed *supra,* pp. 33-35.

Where the court must determine whether, considering all the circumstances, any possible answer by a witness can be deemed sufficiently dangerous to be incriminating, great weight must be given to the determination by the trial judge. As this Court said in the *Mason* case, 244 U.S. at p. 366:

> The general rule under which the trial judge must determine each claim according to its own particular circumstances, we think, is indicated with adequate certainty in the above cited opinions. Ordinarily, he is in much better position to appreciate the essential facts than an appellate court can hold and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere.

In *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 113, this Court said:

> * * * It is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him * * *.

Judge Taft, in *Ex parte Irvine,* 74 Fed. at p. 960, summed up the rule thus:

> The question is for the discretion of the judge, and, in exercising this discretion, he must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

While this Court, by overruling the District Court's determination in the *Hoffman* case, indicated that the ruling of the District Court is not in every case controlling, it did not suggest any modification of the rule of great deference to the trial judge's decision.

Moreover, the *Hoffman* limitation on the trial court's discretion must be read in light of the fact the Court did not know what Hoffman's answers would be, but could easily suppose possible answers which would certainly have been incriminatory. Accordingly, we conceive the rule still to be that the initial determination by the district judge who is familiar with the investigation must be given great weight, and that his determination will not be set aside unless it is based on incorrect principles of law, or is clearly erroneous on the facts. It is our position that the ruling in the instant case is a correct application of the governing rules of law to the particular facts of this case.

C. Under No Test of the Privilege Were the Telephone-Business Questions Asked Petitioner in This Case Incriminating.

Applying the principles of law discussed above, we do not believe that there was in this case a sufficient showing of real, substantial danger of incrimination to warrant sustaining the claim of privilege.

The telephone-business questions (quoted, *supra*, pp. 4-5) in effect asked of petitioner, "For what illegal business do you use your telephone?" On the surface these questions appear to be the same as the Hoffman business question, and would appear to involve speculation as to whether petitioner's answer might not involve an admission that he was engaged in a business violative of federal law.

However, petitioner's full statement of the basis of his claim (see Statement, *supra*, pp. 6-8, n. 3) negatives the possibility that his answer will involve the direct admission of illegal federal activities. Petitioner did not claim that his answer would show he was engaged in a business which is in itself illegal under federal law. He claimed only that an admission that he was in business, or in the numbers business, would tend to show that he had employees for whom he had not paid the taxes required by federal law. Thus he claimed the privilege, not on the basis of direct incrimination, but on the basis that the answer would be a "link in the chain of evidence" or a "clue" to relevant evidence. By his own statement, therefore, he has removed speculation as to his answer; he has shown

that his answer is either that he is in business or in the numbers business. Neither answer is directly incriminatory.[12]

It was thus for the district judge to determine, under the rules discussed above, whether an admission that petitioner was in business, or in the numbers business, represented such a substantial danger as to justify the claim of privilege. We submit that the ruling of the courts below that there was no danger is not clearly erroneous; it is in fact clearly correct.

It is apparent from petitioner's own showing that the tendency of an answer that he is in the numbers business, or in any other unlawful business, to show that he is an employer in that business is very weak. Petitioner himself testified (R. 25-26):

> * * * In the number business there are bankers. * * * And people who work for the bankers; who among other duties, compute the records as turned in by the pickup men and the number writers.

On his own statement, it appears that a person in the numbers "business" might be a banker, a writer, a pickup man, a computer, a bookkeeper,

---

[12] This is very different from the situation before the Court in the *Hoffman* case, where, not only as to the business questions, but as to the *Weisberg* questions, the court could not tell what the answers might be. The Court had to assume that there could be answers which could be incriminating.

or, since the description does not purport to be exhaustive, he might do any number of other imaginable jobs. Only if he were a "banker" could it be argued that he might as a matter of fact have people working for him, and even then it would not be certain.

Moreover, even if people worked for him, in the colloquial sense of the word, it would not follow that they were "employees." Cf. *National Labor Relations Board* v. *Hearst Publications,* 322 U.S. 111; *New Deal Cab Co.* v. *Fahs,* 174 F. 2d 318 (C.A. 5), certiorari denied, 338 U.S. 818; *Brady* v. *Periodical Publishers' Service Bureau,* 173 F. 2d 776 (C.A. 6). The studied efforts of those in illegal activities to keep their relationships distant should not be ignored in determining the permissible inferences from petitioner's admission.

Nor could the fact be ignored that common usage defines "business" to include any principal activity;[18] and in the great majority of cases it

---

[18] Business is defined to include the following:

"• • •

"3. That which busies, or engages time, attention, or labor, as a principal serious concern or interest. Specif.: a. Constant employment; regular occupation; work; as, the *business* of living; *business* before pleasure. b. Any particular occupation or employment habitually engaged in, esp. for livelihood or gain. • • •

• • •

"7. A commercial or industrial establishment or enterprise; as, he sold out his *business;* also, custom; patronage; as, advertising secures *business:*"

Webster's New International Dictionary (Merriam-Webster, 2d ed. 1951), p. 362.

must be assumed that people who say they are in a particular "business" are not employers in that business. Indeed, an excellent example of such usage is given by petitioner himself. He admits that he is in the real estate business.[14] Some people in the real estate business have employees, others do not. Apparently, petitioner has no employees in that business, but is himself an employee of a real estate corporation (R. 218). His admission that he is engaged in that business has no logical tendency to show that he has employees. It is difficult for us to understand how an admission that he is in the numbers business or some other illegal business has any greater tendency in that direction.

Petitioner's admission that he is in business has less probative value to show that he was under a duty to pay federal employee taxes than Mason's presence at a gambling table had to show that he was gambling. Certainly it has none of the direct tendency to prove guilt that this Court found with respect to the Weisberg questions in the *Hoffman* case.

The lack of probative value becomes particularly apparent when considered in relation to the statute

---

[14] The grand jury presentment (R. 6) shows that petitioner answered that he did not use the telephone "in any lawful business," and also shows (R. 7-82) that he was asked "Is it your real estate business you use it for? [referring to the phone at 1133 West Diamond Street]" to which petitioner replied "No."

under which petitioner claims he fears prosecution. Section 2707 of the Internal Revenue Code is designed to insure that, in specific identifiable employer-employee relations, the employer's tax obligations are discharged.[15] For this reason, an admission by petitioner that he is in the numbers business has no such relevance to prove any of the facts necessary to sustain a prosecution under Section 2707 as had the Weisberg admissions in the *Hoffman* case. A conviction simply could not be sustained on a showing that it was probable that a person who was in a particular kind of business might have employees. Nor, indeed, would it be of any value in determining whether an individual in fact had obligations under Section 2707 to know that he had activities in a field where some people have employees. The admission is barely more useful than an admission of a witness' name and address. Cf. *Ex parte Irvine, supra,* at 960 (C.C. S.D. Ohio); *Heike* v. *United States,* 227 U.S. 131, 142.[15a]

Equally, there is no merit in petitioner's alternative objection to the telephone questions that

---

[15] Indeed, the only reported cases that have arisen under the section have been under its related civil liability provisions. See *Paddock* v. *Siemoneit,* 147 Tex. 571, 218 S.W. 2d 428; *In re Haynes,* 88 F. Supp. 379 (D. Kans.).

[15a] Contrast *United States* v. *Girgenti* (C.A. 3, February 6, 1952), in which the Court below sustained a claim of privilege under the social security and withholding tax laws where the witness's answer might have disclosed that he "operated" a gambling house which had at one time accommodated over 150 patrons, and had 12 employees.

disclosure of the business for which he uses the phone will show that he is in a business different from and in addition to the business listed on his income tax return for 1949. The fact that he is now in that business, he contends, will give rise to the inference that he was previously in that business, whereas on his previous return, the only entry of income, in addition to that from his "lawful" real estate business, was "Miscellaneous." On the basis of this, petitioner seems to suggest danger, either from his failure to show the source of his income properly, by saying "miscellaneous" instead of "numbers" or some other unlawful source, or from the possibility that he would also have to admit that he failed to return income from that other business.

As to the first fear, we are shown no authority which holds that it is a misstatement of a "material matter" to return as miscellaneous what is in fact income from an illegal business. Cf. *United States* v. *Sullivan*, 274 U.S. 259.[16] As to the second, it relates to questions about income from such a business which have not yet been asked.

The Second Circuit, which, as noted above, has taken a broad view of the privilege, disposed of a similar contention in *United States* v. *Weinberg*, 65 F. 2d 394 (C.A. 2), certiorari denied, 290 U.S. 675. In a grand jury hearing investigating viola-

[16] This is also the answer to petitioner's contention, not raised in this Court, that he may have violated the False Statements Statute (R. 132).

tions of the prohibition laws, the witness was asked his business in 1929 and 1930, and whether the signatures on two bank account cards in the names of Abe Berg and Jack Berg, respectively, were his. The court held that he was required to answer these questions and rejected his contention that, although the immunity statute protected him against prosecution for prohibition law offenses, it did not protect him against prosecution for offenses under the income tax laws. Judge Swan, for the court, stated:

> It may well be doubted whether a statement of what business the witness was engaged in, or whether a signature on a bank card was his, is not too remotely connected with a possible future investigation of his accounts and a prosecution for income tax evasion to justify his standing mute. Many additional facts have to be assumed before his answer, whatever it may be, can tend to implicate him in a violation of the tax laws.

It is also clear that, so far as petitioner is concerned, the admission that he is in the numbers business cannot provide any clues. It would be difficult to read the record here and not realize that everybody knows that petitioner is in the numbers business. Petitioner all but admits it himself. (See, e.g. R. 49.)[17] He was not asked whether he

---

[17] Petitioner offered to prove by the testimony of the Special Assistant to the Attorney General that " * * * all of the information contained in his file * * * would definitely establish

is in the numbers business to give the government any leads.

It seems evident that, as the court below held, petitioner fears, not the answers to the questions actually asked, but to the prospective questions not yet asked, which he assumes will follow. That is not a ground on which to base a claim of privilege. This Court said in *Rogers* v. *United States*, 340 U.S. 367, 374:

> As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a "real danger" of further crimination.

If petitioner, after admitting that he was in the numbers business, was asked whether he had employees, he might then have legitimately claimed his privilege. He could not, on this anticipatory basis, fail to answer a question which of itself lacked, under any standard, a substantial danger of incrimination. See *United States* v. *Flegenheimer*, 82 F. 2d 751 (C.A. 2), discussed *supra*, where the Second Circuit held that the witness should have answered whether he knew the Harmon whose name appeared with his own on a joint account. The Court stated that it did not have to

---

the unlawful business in which Irving Greenberg is in and concerning which there has been some testimony," and further that the answers to the questions in issue "* * * are not only known to the United States Government but are known to this witness who is at present on the stand."

decide whether the witness could be questioned about the bank account, because no question in regard thereto had been posed.

Thus, in their setting, the telephone-business questions were not incriminating in themselves, as links in the chain of evidence, or as clues to evidence. Petitioner could not properly refuse to answer these questions since they exposed him, at most, only to an anticipatory conjectural danger.

D. Under No Test of the Privilege Were the Identity Questions Incriminatory.

Petitioner does not contend that the disclosure of the names of numbers writers known to him around 1133 West Diamond Street could amount to a direct admission of crime. Cf. *O'Connell* v. *United States,* 40 F. 2d 201 (C.A. 2). He argues that the answer to the question on this issue would amount to a "link in the chain of evidence" against him. We think it is evident, however, that such disclosure would not have the probative value which is required under the decisions of this Court. It is difficult to imagine the use of this disclosure, as such, as part of any case against petitioner. His knowledge of the names of the numbers writers would, of course, be consistent with his being their employer, but it would be equally consistent with many other relationships. Indeed, petitioner himself calls attention (Pet. 3-4) to the following series of questions asked petitioner by the grand

jury, which he had at first refused to answer (R. 3):

> 6. Q. Do you know an address 1133 West Diamond Street?
>
> 7. Q. Do you know whether there is a tailor shop there?
>
> 8. Q. Is that a cleaning and pressing shop at that address?
>
> 9. Q. Do you know a man by the name of L. J. Perry?
>
> 10. Q. Did you ever meet Willie Weisberg there?
>
> 11. Q. Did you ever meet Cappy Hoffman there?

These questions suggest strongly that both Hoffman and Weisberg may have had dealings at that address. It is certainly reasonable to assume that at least some of the people, who would be in the vicinity of 1133 West Diamond Street and who might have been known to petitioner as numbers writers, were not his employees.

And even if the persons named by petitioner were in fact his employees, the particular admission sought would have no significant tendency to establish the fact, because of the equally permissible inferences from the answer that the persons named were simply people with whom petitioner dealt at arm's length in carrying on his numbers activities. As we pointed out above, under its

broad construction of the privilege, the Second Circuit has held that an admission of acquaintanceship would normally be too colorless to be deemed dangerous. *United States* v. *Flegenheimer,* 82 F. 2d 751; *O'Connell* v. *United States,* 40 F. 2d 201. Only under very special circumstances, such as those present in the *Weisman* case (see *supra,* p. 35) can danger be inferred from acquaintance. Such circumstances were present where the question concerned the clandestine, conspiratorial group involved in *Blau* v. *United States,* 340 U. S. 159. In those special situations, mere admission of dealings took on color of guilt. Here, knowledge of numbers writers was in itself colorless as to offenses under federal law.

The fact that petitioner knows numbers writers who come to a particular address may have some tendency to show that petitioner is in the numbers business; it does not tend to show that the persons who come there are his employees. Petitioner's acquaintance with numbers writers is no more suggestive of guilt than O'Connell's acquaintance with members of the pool or DiLarmi's acquaintance with Flegenheimer under the alias of Harmon (see pp. 34-35, *supra*).

A more plausible contention is the suggestion (on which petitioner disclaims the necessity of relying, Pet. 17, n. 13), that disclosure of the names of numbers writers has incriminatory possibilities,

not as evidence, but as a clue to evidence.[18] It is possible that some of the numbers writers may be employees and that they could then be called as witnesses to show that petitioner has employees.

As discussed above, pp. 27-32, this Court has not held that an admission which of itself would not be sufficiently incriminating to be relevant evidence at a trial, may be deemed subject to the privi-

---

[18] It should be noted that this particular basis for the claim of privilege was expressly articulated in this form, not by petitioner himself under oath, but by petitioner's counsel in the course of oral argument prior to the filing of the presentment. Petitioner's "full statement" under oath refers generally to the claim that the answers would incriminate him under federal Internal Revenue laws, to his fear that an admission, that he was in a business other than his legal business and had employees, would incriminate him, and to his reliance on advice of counsel (See Statement, *supra*, pp. 6-8, n. 3). Nowhere did petitioner, under oath, claim that disclosure of the names of numbers writers would furnish the names of witnesses against him. As it was not under his oath, the claim cannot subject him to the penalty of perjury which is perhaps the only lever a court has to assure that the privilege will not be abused more than is necessitated by its nature. This is a factor which a court, ruling on the claim of privilege, may take into consideration in determining whether the claim of danger has been seriously advanced, or indeed, has been advanced at all. Particularly is this true where the specific assertion would not expose petitioner to further danger.

Moreover, it ought also to be noted at this point that the statutory references in petitioner's "full statement" to Section 1625(a) and to Section 1626(a), (b), and (c) do not represent the full basis of petitioner's statutory reliance here. If his claim were limited to those sections, there would clearly have been no criminal liability at the time he testified.

lege simply because it may provide a clue to relevant evidence. In this case, as we have shown, petitioner's admission that he knew numbers writers at a certain address would not have any relevance to prove the federal charges on which he fears prosecution. Hence, on our interpretation of the privilege, he could not refuse to answer the identity questions on that basis.

But even if the "clue" standard is applicable, we do not believe that the danger here is sufficiently close to render the identity questions subject to the claim of privilege.

Petitioner flatly refused to disclose the names of any of the numbers writers whom he knew in the vicinity of 1133 West Diamond Street. It is perfectly obvious on this record that all of the numbers writers around that address whom petitioner might happen to know will not be his employees. Some may be. Some most certainly will not be. Of those who are not his employees, there may be those who know if he has employees, and those who will not. There may indeed be those who would testify that he has no employees. Of those who know or suppose that he has employees, there may be those who know who these employees are, and there will surely be those who do not. Those who think they know may have no valid basis for that supposition.

In short, the gap between petitioner's acquaintanceship with numbers writers at the Diamond

Street address and the Government's ability to use that fact as a source of evidence against petitioner for a federal crime is too great to meet the test of danger which even the cases construing the privilege most broadly have required. (See *supra,* pp. 32-35.)

As the Second Circuit said in *Abrams* v. *United States,* 64 F. 2d 22, in holding that a witness before a grand jury investigating election frauds could not refuse to answer (1) where he lived after he said the address already given was not correct, (2) whether he was the Democratic captain of a certain election district in New York City, (3) where the polling place for that district was at the last election, (4) whether he was present there at that time, (5) whether he was acquainted with persons who acted as inspectors at that last election, (6) whether he filed a report with his district leader of the result of the vote cast at that election, and (7) whether he was present at any other polling place on the election day in question:

> * * * it may be noticed that no answers to these questions could reasonably be thought to have furnished leads to evidence which would tend to prove him guilty of a crime unless we are prepared to go the length of saying that in every criminal investigation the Constitution permits every person to remain silent, if he chooses, merely on the off chance that if he opens his mouth he will say something to indicate that he has committed some crime.

E. If Any Question Should Have Been Answered the Judgment Should Be Sustained.

We believe that petitioner could not properly refuse to answer any of the questions on which the judgment was founded. But if his refusal is found to be improper as to any one, the judgment should be affirmed. The sentence of five months' imprisonment was a general sentence which was within the court's discretion to impose if petitioner was properly held in contempt in any respect. See *Pinkerton* v. *United States,* 328 U.S. 640, 641, n. 1; *Hirabayashi* v. *United States,* 320 U.S. 81; *Blau* v. *United States,* 340 U.S. 332, 335 (dissenting opinion).

This is a matter of some importance to the Government. The constant interference with the grand jury process of contumacious refusals to answer cannot be controlled unless the courts are willing to evaluate each question on its own merits, and to refuse to permit the witnesses to profit by the fortuity that they could find one question where the Government stepped over a nearly invisible line. Cf. *O'Connell* v. *United States, supra.*

II

Whatever Variance There Might Have Been Between What the District Judge Orally Found and His Formal Written Judgment Was Immaterial and Did Not Prejudice Petitioner

Petitioner contends that the formal judgment varied from the judgment pronounced in court (the latter, he says, being "a general finding of guilty") in that it omitted to find him in contempt

(1) for refusing to answer the question, "Are you in the numbers business now," and (2) for obstruction of justice (Pet. 18-19). Consequently, he argues, (a) that "to the extent that the [formal judgment] varie[d] from what was said in court, it is utterly void" (Pet. 19), and (b) that, "whereas the sole emphasis at the trial was on petitioner's alleged violation of 18 U.S.C. 401(1) [obstruction of justice], the gravamen of the formal judgment and commitment and of its affirmance on appeal was his violation of 18 U.S.C. 401(3) [disobedience of the court's order]," with the result that there was "a deprivation of due process" under the "rule that a man shall not be charged with one crime and convicted of another" (Pet. 21).

The presentment, as amended at the trial, charged petitioner with violating both subsections (1) and (3) of 18 U.S.C. 401 [19] in refusing to answer the three questions referred to in the formal judgment and also the question, "Are you in the numbers business now," and the trial proceeded on the understanding that he was being tried for refusing to answer these four questions (R. 10-14). *Prima facie,* the formal judgment rather than a

---

[19] And we find nothing in the record to support petitioner's assertion that "the sole emphasis at the trial was on petitioner's alleged violation of 18 U.S.C. 401(1)." Consequently, his contention that he was deprived of due process by being charged with one crime and convicted of another is wholly without factual basis.

statement in an opinion or a docket entry is the judgment of the court. *United States* v. *Hark*, 320 U.S. 531, 534-535. The controlling factor, however, is the intent of the judge at the time sentence is pronounced. *Wilson* v. *Bell*, 137 F. 2d 716, 720 (C.A. 6); *Watkins* v. *Merry*, 106 F. 2d 360, 361 (C.A. 10). Cf. *Miller* v. *Sanford*, 161 F. 2d 291 (C.A. 5),[20] certiorari denied, 332 U.S. 774. The oral statements of the District Court that petitioner was "adjudge[d]" "in contempt of court" (R. 65) and sentenced "for violation of criminal contempt" (R. 71) did not unequivocally indicate an intention to find him in contempt in all respects as charged in the presentment. The court did not state that petitioner was found guilty as charged. This ambiguity in the oral pronouncement of the court was, therefore, clearly resolved by its formal judgment.

---

[20] P. 292: "As to the contention that the docket entry made by the judge of the sentence in the Southern District of Texas overrides the sentence which he signed, it is true that at common law sentence was orally pronounced by the judge and taken down by the clerk in the minutes, which were later signed by the judge as a whole. The docket entry was only the memorandum of the judge, and not the record of the sentence. The practice in the federal courts was changed on May 24, 1937, by an amendment of Rule 1, Procedure in Criminal Cases after Verdict, to require: 'The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.' 301 U.S. page 717. Here the sentence as signed by the judge was the effective sentence. It is needless to enquire whether the docket entry does not mean the same thing, as appellee contends."

But even if the oral finding did find petitioner in contempt in every respect as charged in the presentment, the omission in the formal judgment of some of the specifications embodied in the oral pronouncement was not detrimental to him, but rather to his benefit, for such omissions constituted, in effect, a vacation of part of the judgment. A vacation of the judgment as to the charge of violation of 18 U.S.C. 401(1) would not render the judgment void or give petitioner cause for complaint as to a violation of 18 U.S.C. 401(3). Likewise, a vacation of the judgment of contempt of court for refusing to answer one question would not invalidate the judgment of contempt for refusing to answer the other questions. Cf. *Pinkerton* v. *United States,* 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States,* 320 U.S. 81, 85; *Irving Blau* v. *United States,* 340 U.S. 332, 335 (dissenting opinion).

In respect of the question, "Are you in the numbers business now," we think it unimportant in any event whether the judgment was in part based upon petitioner's refusal to answer it, for it involves the same problems under the Fifth Amendment as the questions concerning the business in which petitioner used the telephone (see discussion, *infra,* pp. 42-50).[21]

---

[21] We see no basis in fact for petitioner's contention that the Court of Appeals dealt with this question, or with petitioner's guilt of obstruction of justice, in its second opinion on the remand. See footnote 5, *supra.*

III

The Record Shows That Petitioner Disobeyed Orders of The District Court in Connection With the Questions Here Involved

Petitioner further contends that there was "no proof either of any order by the district court or of any disobedience of any such order" (Pet. 13-15). On the contrary, the record does contain such proof.

Petitioner had been brought before the court for the very purpose of securing an order compelling him to answer the questions, and there were extensive hearings on the issue whether such an order should be granted. Petitioner was represented at the hearings by counsel who argued at great length that the answers to the questions would incriminate him. During the seventh day of these hearings, on October 30, immediately following an argument by petitioner's counsel on the alleged incriminating character of the identification question, the court said, "I don't see here where there is any direct tendency to incriminate him. It may involve number writers, but I won't bridge that gap. I am directing him to answer who they are." (R. 231.) To this petitioner's counsel excepted, indicating that he understood it to be an order. Later that day the court suggested that, since all the "repeated refusals to answer concern itself with the basic question 'Are you in the numbers business' " and "since counsel [for petitioner] have chosen to make their stand" not to answer it, an appeal

be taken only on that question (R. 145-146). But this suggestion was not acceptable to government counsel. Mr. Goldschein stated that he thought he might eventually get the answer (R. 145) and that his position was "simply this. At first [petitioner] refused to answer quite a string of questions. The Court compelled him to answer. Of course we can't anticipate which questions [if he is ordered to answer them] he will or which questions he won't," with which the court agreed, stating, "That is right" (R. 146). And later that day the court announced its order, stating, "I am going to rule [22] here, that these questions have to be answered * * * " (*ibid.*).[23] It is clear that petitioner's counsel understood this ruling to be an order that petitioner answer the questions before the grand jury, for following it there occurred a colloquy concerning the time when petitioner should again go before the grand jury (*ibid.*), and petitioner's counsel (while arguing for a ruling on his request for the grand jury minutes and government files) said, "we are one day before, let us say, the contempt proceeding, or two * * * " (R. 147). There is no suggestion anywhere in the record that petitioner or his counsel did not fully understand

---

[22] The statute under which petitioner was convicted, 18 U.S.C. 401, *infra*, p. 83, provides for punishment for contempt of the court's authority in disobeying its lawful "writ, process, order, rule, decree, or command."

[23] This part of the record of the hearing of October 30 was admitted into the record of the contempt trial (R. 14-15).

that petitioner was ordered to answer the questions before the grand jury.[23a]

Petitioner admitted at the trial that he had refused to answer before the grand jury the questions set forth in the presentment (R. 10-14), which were the ones that he had been ordered to answer, and, accordingly, that he had disobeyed that order. Furthermore, when the court offered him an opportunity to purge himself by answering the questions, his counsel stated, "We take the same position we have taken before" (R. 65), thereby indicating that petitioner would continue to refuse to answer them and, accordingly, to refuse to "obey the Order of this Court," as the judgment recited (R. 201).

IV

Petitioner Was Not Entitled to Subpoena Either the Government's Records or the Grand Jury Minutes

On October 17, 1950, petitioner issued a Subpoena Duces Tecum directed to Max H. Goldschein, Special Assistant to the Attorney General, to bring

> * * * all records concerned with investigation of Irving Greenberg, and used in connection with the examination of Irving Greenberg as a witness before the Grand Jury, and with the examination and questioning of other witnesses who have appeared before the Grand Jury and have testified about Irving Greenberg.

[23a] Indeed, the trial court found that petitioner had been instructed to answer the questions in issue. See R. 199-201.

The United States filed a motion to quash this subpoena. Petitioner maintains that the District Court erred in refusing him access to the grand jury minutes and government files concerning the grand jury's investigation (Pet. 21-25). In order to determine whether this action of the District Court was proper it is necessary to examine its rulings with regard to those minutes and files.[24]

After *United States* v. *Zwillman*, 108 F. 2d 802 (C.A. 2), had been called to the court's attention both in oral argument and briefs, the court, on October 19, deferred ruling on the question whether it would force the Government to expose its files and the grand jury minutes until petitioner had made a showing that he was "in reasonable apprehension," which would give the court some "criterion" on which to decide whether it had "any right to request the Attorney General to produce the records" (*supra*, p. 10, R. 111). On October 30, when the matter was again called to the court's attention, it asked petitioner's counsel if he was going to offer some showing (R. 147). And on the next day, October 31, no showing having been made,[25] the

---

[24] The Court of Appeals said (R. 238-239): "the court did not err in refusing appellant access to the grand jury minutes and to the files of the government."

[25] At this point, the only evidence petitioner had offered was a statement by himself that he believed the answers would incriminate him under the federal revenue laws and a like statement by his counsel (*supra*, pp. 6-8, n. 3). At his con-

court said, "Now, I say to you with respect to that motion for the production of the documentary evidence, on the record as it now is it will still be held under advisement until and when you show by proper cause that these questions have a tendency to incriminate. * * * You will put this man on the stand, Greenberg, if you want to, if you see fit. * * * We will not divulge Grand Jury proceedings to you or to any other counsel or anybody else. When and as you make some showing that this defendant, that this witness is in reasonable danger of incriminating himself to the satisfaction of this Court, I will then decide whether or not this is the fact, or if there is some showing that he reasonably might be put in danger, then I will decide whether or not they may be inspected, but until that showing has been made, you will not see any Grand Jury proceedings. * * * Until you make some showing you will not see those records" (R. 150-151). When petitioner's counsel again renewed this request, on November 1, the court repeated its earlier ruling, stating, "I told you, and now again, that I will on a proper showing * * * " (R. 190). And at the contempt trial, on Novem-

---

tempt trial, on November 3, petitioner further testified that he had not filed social security and withholding tax returns during 1950, and he introduced newspaper articles indicating that the Government intended "to strike indirectly at racketeers" "through the Federal revenue and conspiracy laws" and a statement by himself that bankers in the number business had employees (*supra*, pp. 9-10).

ber 3, the court said, "The motion with respect to quashing the subpoena duces tecum is still held under advisement until proper showing is made" (*supra*, p. 12, R. 53).

1. The right to refuse to disclose criminatory matter is not absolute. It was recognized very early that the privilege of the witness not to criminate himself conflicted with the right of the community to the testimony of every man. In *United States* v. *Burr, supra,* Marshall, C. J., said (at pp. 39-40):

> * * * The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, *can neither of them be entirely disregarded.* They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule, *and of the exception to that rule,* by observing that course which it is conceived courts have generally observed. * * * [Emphasis added.]

Although the privilege is expressive of a principle deeply rooted in our history, see 8 Wigmore, *Evidence* (3d ed., 1940) § 2250; Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 21 Va. L. Rev. 763, and although it must be construed broadly to accomplish its purpose, *Counselman* v. *Hitchcock, supra,* at p. 562, it has never been doubted that it represented an interference with

legitimate investigative efforts. Consequently, the privilege has always been construed sufficiently narrowly to prevent its abuse. Cf. *Mason* v. *United States, supra; Heike v. United States, supra; Abrams* v. *United States, supra,* at pp. 24-25; see also, *United States* v. *Sullivan, supra* (which shows that a person will not be permitted to draw a wide circle around possible crimination).

The grand jury process, on the other hand, is an established and appropriate technique for supplementing governmental investigation. See Dession and Cohen, *The Inquisitorial Functions of Grand Juries,* 41 Yale L. J. 687. The need for secrecy in its functions is imperative. See *Hale* v. *Henkel,* 201 U.S. 43, 59. The reasons for this were clearly spelled out, in part, in *Goodman* v. *United States,* 108 F. 2d 516, 519 (C.A. 9), as follows:

> Grand juries have been aptly characterized as "the voice of the community accusing its members." In re Kittle, C.C., 180 Fed. 946, 947. From earliest times it has been the policy of the law to shield the proceedings of these bodies from public scrutiny, and to this end the grand jurors themselves have always been sworn to keep their own counsel and that of the state or of the King. * * * In part the purpose is to protect grand jurors, complainants and witnesses, so that the jurors may deliberate and vote without fear that their conduct will be disclosed elsewhere, and that those who

testify may feel free to speak the truth without reserve. Other reasons for the rule are that if the accused should learn that his conduct is under investigation he is likely to flee arrest or to tamper with witnesses; and that one who is unjustly accused, but is exonerated by the refusal of the grand jury to indict, may not suffer injustice by a disclosure that he has been under investigation for the commission of a crime.

Further, the evidence taken before grand juries is confidential matter, to which the accused person has no right of access. Metzler v. United States, 9 Cir., 64 F. 2d 203; United States v. American Medical Ass'n, D.C., 26 F. Supp. 429; United States v. Providence Tribune Co., D.C., 241 Fed. 524; State v. Broughton, 1846, 29 N.C. 96, 7 Ired. 96, 45 Am. Dec. 507.

In these circumstances, the propriety of Rule 6(e) of the Federal Rules of Criminal Procedure protecting the secrecy of the proceedings seems clear. The Rule provides:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may dis-

> close matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. * * *

It permits examination into the minutes only when the defendant has made an adequate "showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

It was the position of the District Court, and we think it correct, that petitioner never made any such showing. Petitioner made an extensive offer of proof (R. 48-53) which indicates the purpose for which he wanted both the minutes of the grand jury and other records in the hands of the Special Assistant to the Attorney General who was aiding the grand jury in its investigation. In no respect does it amount to the kind of showing required by Rule 6(e).

Thus, petitioner's counsel stated:

> I purpose to prove by this witness that there were hundreds or perhaps over a thousand questions asked of Irving Greenberg before

the Grand Jury, and that he has answered every one of those questions with the exception of the three or four questions which are presently before Your Honor.

I purpose further to show by this witness that other witnesses who appeared before the Grand Jury were asked concerning this witness, Irving Greenberg.

I also intend to show by this witness that Irving Greenberg himself is being investigated and was during the course of this Grand Jury by the United States Government.

I purpose to show that this witness knows that Irving Greenberg was the subject of an investigation by the United States Government prior to the calling of this Grand Jury, and that the very questions for which he is now on trial for contempt, that the answers to those questions are not only known to the United States Government but are known to this witness who is at present on the stand.

I also purpose to show that to substantiate that knowledge there is in the possession of this witness * * * all of the information contained in his file which would definitely establish the unlawful business in which Irving Greenberg is in and concerning which there has been some testimony.

* * *

> I purpose to ask this witness to produce the record for which he was subpoenaed and for which there was a subpoena duces tecum commanding him to appear and bring with him all records concerned with the investigation of Irving Greenberg as a witness before the Grand Jury, and in connection with the examination and questioning of other witnesses who have appeared before the Grand Jury and who have testified about Irving Greenberg.
>
> If this witness shall have produced those records, then, of course, I would be governed by a further offer of proof as to what those records revealed and asking him further questions.

It seems to us that petitioner's own statement negatives the importance of his asserted right to the grand jury minutes. Except for the last mentioned offer, which rather blandly concedes that petitioner wanted to go on a "fishing expedition," the minutes would add practically nothing. Compare *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221.

A court, in passing on claims of privilege is required to determine only whether an incriminatory answer is possible. And we have already indicated, in urging that the privilege is not available here, the factors that in this case make the apprehended danger remote and fanciful. Nothing in the grand jury minutes could have added

substance and concreteness to the claim of danger.

2. Moreover, so far as petitioner's request was for the right to peruse the grand jury minutes, none of the cases on which he relies sustains his view. In all of them the information sought to be obtained was specific. In *United States* v. *Andolschek*, 142 F. 2d 503 (C.A. 2), the data sought were reports prepared by the defendants themselves and turned in to the Government. The defendants had been indicted for bribery and they sought to show by these reports that their earlier dealings with the outside persons involved had been honest. The pin-pointed effort to get these data contrasts sharply with the generalized search apparently contemplated here.

In *United States* v. *Beekman*, 155 F. 2d 580 (C.A. 2), the defendant, under prosecution for violation of Office of Price Administration regulations sought to challenge the impartiality of the principal witnesses against him by subpoenaing OPA records which would have shown that these witnesses had themselves been disciplined by the OPA for overcharges. Again, this was no random search for whatever might turn up. Nor was it a search to develop facts which were demonstrably not relevant.

Equally specific was the demand in *United States* v. *Grayson*, 166 F. 2d 863 (C.A. 2). That was a prosecution for fraudulent use of the mails and for violation of the Securities Act by making gross

misrepresentations about the value of certain oil royalties. Defendant sought to introduce certain "Sales Reports" filed with the Securities and Exchange Commission showing the prices at which royalties in these tracts had been sold to others in earlier years. The Court of Appeals for the Second Circuit held it was reversible error to refuse to admit this testimony. Cf. *United States* v. *Krulewitch*, 145 F. 2d 76 (C.A. 2).

But again, there was no random search for data. Moreover, there is a wide difference between departmental regulation and the long history of secrecy in grand jury investigation. It is true that a superficial reading of *United States* v. *Zwillman*, *supra*, suggests that the Second Circuit recognizes no difference. However that may be, we think it is clear that the *Zwillman* case does not conflict with the decision below. The ruling of the District Court in that case "that only the questions [which the defendant had refused to answer] themselves were material in a proceeding to punish for contempt" (108 F. 2d at 804) is in striking contrast to the rulings of the District Court in this case. As we have shown, the District Court repeatedly indicated that petitioner could introduce other evidence to show the necessity for disclosing the grand jury minutes and government files and it afforded him full opportunity to show by his own evidence that the answers to the questions would tend to in-

criminate him.[26] In the *Zwillman* case, on the other hand, the court, on the objection of the Government, excluded all evidence offered by the defendant, including the grand jury proceedings (108 F. 2d at 803), and "he was warned by the court that nothing was relevant on the presentment for contempt except the questions which he had refused to answer" (*id.*, at 804). We think that in the part of the Zwillman opinion upon which petitioner relies (Pet. 23)[27] the court was referring to the entire conduct of the Government in securing the exclusion of all evidence offered by the defendant, rather than only the grand jury proceedings. Certainly that language must be read in the

---

[26] See R. 185: "Mr. Witkin. • • • In other words, I don't think either Mr. Goldschein, and I know Your Honor wouldn't presuppose to tell us what evidence we ought to present.

"The Court. I certainly would not."

[27] 108 F. 2d at 803-804:

"It is true that the government was not obliged to disclose the testimony before the grand jury or to state the purpose of the inquest or whether prosecution of the defendant was proposed. But if it chose to adopt such an attitude and to confine the defendant's defense only to showing that the questions asked were incriminating on their face, it could not put him in contempt for declining to answer so long as it prevented him from adducing evidence that might demonstrate that his answers were likely to form vital links in the proof of a conspiracy in which he was involved. In the present case the government prevented him from showing that his answers would tend to incriminate him and thereby, deprived him of his right to a proper trial where he could offer evidence in his defense."

light of the facts of the case. The court's conclusion that the Government "could not put [the defendant] in contempt" was limited to the situation before the court, i.e., where the Government "chose to * * * confine the defendant's defense only to showing that the questions asked were incriminatory on their face * * *." Since the exclusion of grand jury proceedings could not alone have that effect, the decision does not support petitioner's contention that he was entitled to see the proceedings in preparing his defense.

3. The advisor's notes to Rule 6(e) make it clear the matter was to be left to the discretion of the district courts. It mentioned earlier decisions which had worked out this rule. *Schmidt* v. *United States,* 115 F. 2d 394 (C.A. 6); *United States* v. *American Medical Association,* 26 F. Supp. 429 (D.D.C.). Each of these cases shows, however, that the importance of the requirement of grand jury secrecy required a strong showing be made before disclosure would be allowed. In *United States* v. *American Medical Ass'n, supra,* defendants, under indictment, moved for court approval of their right to interrogate members of the grand jury which returned the indictment, and the right to examine the transcript of the grand jury proceedings with a view to discovering whether there was misconduct by government counsel or incompetent or irrelevant evidence introduced, all of which, if found, might be used by the defendants to vitiate

the indictment. One of defense counsel by affidavit alleged that he had been informed by various defendants and believed that attorneys for the Government presented irrelevant testimony to the grand jury, advised it as to the law, and requested and persuaded it to return the indictment; and that certain members of the jury had indicated a willingness to discuss this except for uncertainty as to their right. The court reviewed the compelling reasons for the grand jury secrecy rule and concluded that defendants were not entitled to relief. It stated, at 430-431:

> * * * there is no question of a court's power to go back of an indictment to inquire whether vitiating irregularities induced the finding. * * * But it is a power sparingly used; justified only where by proper verified pleading a clear and positive showing is made of gross and prejudicial irregularity influencing the grand jury in returning an indictment. Averments on information and belief have been uniformly held not enough. * * * Thus we have the novel situation of defendants admitting that they are in no position to file the essential pleading to justify the court in making an inquiry, yet nevertheless asking that the inquiry be ordered anyway, in the expectation or hope that material will turn up to support a proper plea. Manifestly the court ought not grant such a motion. * * * The effect * * * would be to

> break down all legal checks against technical, dilatory tactics. The strong presumption of the regularity of grand jury proceedings would no longer prevail. Cox v. Vaught, 10 Cir., 52 F. 2d 562. Every accused could upon the flimsiest pretext enlist the court's aid in a "fishing expedition," to discover some supposed irregularity to use as a basis for dilatory action; to cull over the evidence and get the government's case against him in advance of trial; to divert and turn back the course of a criminal case from a trial of himself to a trial of the grand jury and the prosecuting officers. * * * There could be no effective way of guarding against the manifold abuses that such a practice would encourage. The defendants complain that with the lips of jurors sealed and the transcript closed to them they cannot obtain the true facts except by aid of the court. But it must be remembered that sound reasons of public policy in the administration of justice lie back of the rules which forbid free access to these channels of information. * * *

We think that this case is a sufficient answer, perhaps more than sufficient, to all the objections of substance or policy which petitioner has made.

Schmidt v. *United States, supra,* also cited by the revisers of the rules, was a contempt proceeding against two attorneys, among others, for advising that it was proper for certain grand jurors

to violate their oaths of secrecy by signing certain affidavits disclosing what happened during the grand jury deliberations leading up to indictments of the attorneys' clients. After reviewing carefully the factors requiring secrecy of grand jury proceedings, and citing the *Goodman* case, *supra*, the court also pointed out the objections to the rule of secrecy. It then observed, at p. 397:

> It follows that the public interest in maintaining the secrecy of the grand jurors' deliberations and the interest of the accused in exposing them may often be in direct conflict. The responsibility of evaluating these conflicting considerations in the interest of truth and justice is a delicate one. It is unthinkable that the decision should be left to the bias of an accused or his counsel, or to the inexperience of a juror. Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its "judicial inquiry."

It is clear that the court's exercise of discretion here was proper.

4. The problem is not basically different when we deal with the petitioner's contention that he was entitled to examine all of the information in the prosecutor's files relating to him. By statute (5

U.S.C. 22, R.S. 161) the head of each department is authorized to prescribe, among other things, regulations not inconsistent with law, for the conduct of its officers and the execution, use, and preservation of its records, paper and property.

Pursuant to the authority vested in him by this statute the Attorney General of the United States issued Order No. 3229—Department of Justice, which provides:

> Pursuant to authority vested in me by R.S. 161 (U.S. Code, Title 5, section 22), It is hereby ordered:
>
> All official files, documents, records and information in the offices of the Department of Justice, including the several offices of United States Attorneys, Federal Bureau of Investigation, United States Marshals, and Federal penal and correctional institutions, or in the custody or control of any officer or employee of the Department of Justice, are to be regarded as confidential. No officer or employee may permit the disclosure or use of the same for any purpose other than for the performance of his official duties, except in the discretion of the Attorney General, The Assistant to the Attorney General, or an Assistant Attorney General acting for him.
>
> Whenever a *subpoena duces tecum* is served to produce any of such files, documents, records or information, the officer or employee

on whom such subpoena is served, unless otherwise expressly directed by the Attorney General, will appear in court in answer thereto and respectfully decline to produce the records specified therein on the ground that the disclosure of such records is prohibited by this regulation. [11 F. Reg. 4920—May 4, 1946, 11 F. Reg. No. 177, Part II, Page 177A—107 Sec. 51.71, Sept. 11, 1946].

The validity of the regulations promulgated by the various executive departments under and by virtue of this statute is well settled by decisions of the federal courts.[28] Such regulations have the force of law and the courts have no jurisdiction or power to punish departmental employees for conforming.[29] Departmental records and documents

---

[28] *Boske* v. *Comingore*, 177 U.S. 459; *Ex parte Sackett*, 74 F. 2d 922 (C.A. 9); *In re Lamberton*, 124 Fed. 446 (W.D. Ark.); *Stegall* v. *Thurman*, 175 Fed. 813 (N.D. Ga.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D. Ky.); *Walling* v. *Comet Carriers*, 3 F.R.D. 442 (S.D. N.Y.); 25 Op. Atty. Gen. 326; 29 Op. Atty. Gen. 555.

[29] *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462; *Boske* v. *Comingore*, *supra*; *Ex parte Sackett*, *supra*; *In re Huttman*, 70 Fed. 699 (D. Kans.); *In re Weeks*, 82 Fed. 729 (D. Vt.); *In re Lamberton*, *supra*; *Stegall* v. *Thurman*, *supra*; *Harwood* v. *McMurtry*, *supra*; *Fleming* v. *Bernardi*, 1 F.R.D. 624, 4 F.R.D. 270 (N.D. Ohio); *United States ex rel. Tennessee Valley Authority* v. *Neal*, 45 F. Supp. 382 (E.D. Tenn.); *Walling* v. *Comet Carriers*, *supra*; *United States* v. *Potts*, 57 F. Supp. 204 (M.D. Pa.).

which are of such a character that their production would be harmful to governmental operations or to public interest [30] have long been regarded as privileged.

The offers of proof, *supra*, pp. 68-70, indicate that these materials were to be culled in much the same fashion that petitioner wanted to cull the grand jury minutes. We have already urged that on the facts, the specific offers were of no importance because the court's ruling had already comprehended them. And so far as the Second Circuit decisions sustain some right to compel the Government to disclose certain kinds of information or forego its prosecution, it has no application to a broadside request.

It will perhaps suffice to indicate the policy considerations implicit on this phase of the case to note some language of Learned Hand, *J.*, used in 1923 in *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D.N.Y.):

> Finally, the defendants, recognizing that it is difficult to make a case for quashal by the scraps of evidence accessible, move for inspection of the grand jury's minutes. I am no more disposed to grant it than I was in 1909. U. S. v.

---

[30] *Vogel* v. *Gruaz*, 110 U.S. 311, 316, an action for libel, citing with approval *Worthington* v. *Scribner*, 109 Mass. 487; *In re Quarles and Butler*, 158 U.S. 532, 535, 536 (holding as privileged information to government officials concerning alleged violations of law.

Violon (C.C.) 173 Fed. 501. It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

MAX H. GOLDSCHEIN,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
JOHN R. WILKINS,
Attorneys.

MARCH, 1952

APPENDIX

Constitutional Provision and Statutes and Regulations Involved

The Fifth Amendment of the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

18 U.S.C. 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Internal Revenue Code:

Section 145 (c):

> Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony * * *

Section 1400:

> * * * there shall be levied, collected, and paid upon the income of every individual a tax

equal to the following percentages of the wages * * * received by him * * *

Section 1401 (a):

The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

Section 1430:

All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 * * * shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the taxes imposed by this subchapter.

Section 1622 (a):

Every employer making payment of wages shall deduct and withhold upon such wages a tax equal to the sum of the following: * * *

Section 1625 (a):

Every employer required to deduct and withhold a tax in respect of the wages of an employee, or who would have been so required if the employee had claimed no more than one withholding exemption, shall furnish to each such employee in respect of his employment during the calendar year, on or before January 31 of the succeeding year, or, if his em-

ployment is terminated before the close of such calendar year, on the day on which the last payment of wages is made, a written statement showing the wages paid * * * and the amount of the tax deducted and withheld * * *.

Section 1626 (a):

In lieu of any other penalty provided by law (except the penalty provided by subsection (b) of this section), any person required under the provisions of section 1625 to furnish a statement who willfully * * * fails to furnish a statement in the manner, at the time, and showing the information required under section 1625, or regulations prescribed thereunder, shall for each such failure, upon conviction thereof be fined not more than $1,000, or imprisoned for not more than one year, or both.

Section 1626 (b):

In addition to the penalty provided by subsection (a) * * * [there shall be] a civil penalty of not more than $50.

Section 1627:

All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax under this subchapter.

Section 2707:

(b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(c) Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Regulations:

The pertinent portions of 26 C.F.R. 402, Employment Taxes, provide:

402.601 Tax and Information Returns

Every employer shall make a tax and information return on Form SS-1a for the first quarter after December 31, 1939, within which wages are paid to his employee or employees, and for each subsequent quarter (whether or not wages are paid therein) until he files a final return as required by the provisions of Section 402.603. For quarters commencing after December 31, 1949 Form 941 shall be used in lieu of Form SS-1a. One original return shall be filed with the collector. For purposes of returns under the Act, the quarters shall each be three calendar months as follows: (a) from January 1 to March 31, both dates inclusive; (b) from April 1 to June 30, both dates inclusive; (c) from July 1 to September 30, both dates inclusive; and (d) from October 1 to December 31, both dates inclusive.

405.601 Return and Payment of Income Tax Withheld on Wages.

Except as provided in 405.602 every person required, under the provisions of section 1622, to deduct and withhold the tax on wages shall make a return and pay such tax on or before the last day of the month following the close of each of the quarters ending March 31, June 30, September 30, and December 31. * * * Such return is to be made on Form W-1, Return of Income Tax withheld on

Wages, and must be filed with the collector of internal revenue for the district in which is located the principal place of business or office of the employer, or if he has no principal place of business or office, then in the district in which is located his legal residence. For quarters commencing after December 31, 1949, Form 941 shall be used in lieu of Form W-1. The return on Form 941 must be filed with the collector of internal revenue for the district in which is located the principal place of business of the employer. * * *

402.609—Records—(a) Records of Employer.

(1) Every employer liable for tax shall keep accurate records of all remuneration (whether in cash or in a medium other than cash) paid to his employees after December 31, 1939 * * *.

Section 29.54-1 of Treasury Regulations 111 provide in part as follows:

* * * The books or records required by this section shall be kept at all times available for inspection by internal revenue officers * * *.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—894932/P.O.931

FILED
APR 1 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

Reply Brief 1

Appendix—Why the prosecutor in this case wanted petitioner to admit being in the numbers business 16

CITATIONS.

Cases:

(*Patricia*) *Blau* v. *United States*, 340 U. S. 159 5
Bruno v. *United States*, 308 U. S. 287 5
Hill v. *United States*, 298 U. S. 460 13
Hoffman v. *United States*, 341 U. S. 479 .....1, 2, 3, 4, 5, 7, 14, 15
Johnson v. *United States*, 318 U. S. 189 3
United States v. *Murdock*, 284 U. S. 141 13
United States v. *Remington*, 191 F. 2d 246, certiorari denied, No. 387, this Term 6
United States v. *Singleton*, 193 F. 2d 464, pending on certiorari, No. 666, this Term 7
United States v. *Zwillman*, 108 F. 2d 802 6

Statutes:

18 U. S. C. 401(1) 8, 13
18 U. S. C. 401(3) 8, 10
18 U. S. C. 3481 5
26 U. S. C. 145(b) 17
26 U. S. C. 145(c) 3
26 U. S. C. 3809(a) 3

Miscellaneous:

Balter, *Fraud Under Federal Tax Law*, 280-285 18
Rothwacks, *Criminal Tax Prosecutions*, in 1 *Current Issues in Federal Taxation*, 269-289 17
Rothwacks, *Problems in Criminal Tax Prosecutions*, in 3 *id.* 297-327 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 461

IRVING GREENBERG, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

A relatively short reply will serve to demonstrate the obvious infirmities of the Government's voluminous brief in this case.

I

A. The Government starts its argument (U. S. Br. 21) by quoting that portion of the opinion in *Hoffman* v. *United States*, 341 U. S. 479, 486, which commences by saying that

> The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.

But the Government's brief, though it extends over 80 pages, never goes on to quote the last portion of the paragraph in question, *viz.*,

> However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result.

(We have italicized the conditional words to emphasize that certainty of incrimination is not a prerequisite to successful invocation of the constitutional privilege.)

Nor does the Government at any point quote the further portion of the *Hoffman* opinion, *id.* at 488, where the Court said that

> Petitioner could reasonably have sensed the peril of prosecution for federal offenses ranging from obstruction to conspiracy.

The omitted portions of the *Hoffman* opinion necessarily undercut all of the Government's obviously labored endeavors (U. S. Br. 14-18, 21-55) to whittle down the privilege against self-incrimination to the point where it would be available only in circumstances where the assertion that an answer would be incriminating would in and of itself incriminate the witness.

B. Here, petitioner showed that he had not filed any social security or withholding tax return (R. 37a). He showed that such returns would have been required as a matter of federal law, if while engaged in a business unlawful under state law, he had any employees in such business (R. 19a-26a). He showed that the nature of the numbers business was such that it required employees (R.

25a-26a). He stated that he had used his telephone "not for my lawful business" (R. 8a). And he showed that the prosecutor had announced in the public press an intention to strike at "numbers, slot machines and other rackets * * * through the Federal revenue and conspiracy laws" (R. 196a) "even though there are no Federal laws regarding numbers" (*ibid.*), and that his own fear of self-incrimination was based in part on what he had read in the newspapers (R. 56a, 132a, 176a).

Moreover, if petitioner testified to being engaged in any business, whether lawful under both state and federal law, or unlawful under either, that fact would be relevant to prove that he had previously been engaged in that business. See *Johnson* v. *United States*, 318 U. S. 189, 195-196. If, therefore, the proceeds of that business had not been reflected in his records or returns, he could not possibly answer any question relating to that business without incriminating himself under Sections 145(c) or 3809(a) of the Internal Revenue Code, regardless of the nature of that business. And, significantly, this grand jury was investigating violations of the internal revenue laws (R. 2a), and the prosecutor had announced that he was striking at "numbers * * * and other rackets * * * through the federal revenue and conspiracy laws" (R. 196a, 197a).

In those circumstances, we submit, petitioner had shown enough to indicate that he was in danger without going on to testify that in fact he himself had employees in his ventures, or that he himself was in the numbers business or concerning the unlawful business for which he used his telephone. The answers to such questions were the critical links in the chain; affirmative answers would have been admissions of guilt. In any event, petitioner had shown enough to be justified in believing that he was in a precarious position. Therefore, as the *Hoffman* case teaches, 341 U. S. at 488-489,

> In this setting it was not "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the an-

> swer[s] cannot possibly have such tendency" to incriminate. *Temple* v. *Commonwealth*, 75 Va. 892, 898 (1880), cited with approval in *Counselman* v. *Hitchcock*, 142 U. S. 547, 579-580 (1892). See also, *Arndstein* v. *McCarthy*, 254 U. S. 71 (1920).

Certainly petitioner's danger was real; it was neither remote nor imaginary; and in the setting in which it was asked, having particular reference to the prosecutor's announced intention to strike at "numbers" through the revenue laws (R. 196a, 197a), he had shown, not only that disclosure "might be dangerous" (*Hoffman* at 487), but that it would be, particularly, in view of the significance, in federal tax prosecutions, of admitting that one is engaged in an income producing business. See Appendix, pp. 16 *et seq., infra.*

C. The Government argues (U. S. Br. 16; see also U. S. Br. 43-45, 49-51, 54) that

> The admission by petitioner that he is in the numbers business has no significant tendency to show that he is an employer in that business. He might be and he might not be.

But petitioner's claim of privilege was rested in part (R. 132a, 176a, quoted at U. S. Br., note 3 at p. 8) on "my own inherent belief of self-incrimination due to the fact that I have knowledge of what my answers to the refused questions would be." Therefore, as in *Hoffman*, "it was not 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency' to incriminate." Petitioner here, as in *Hoffman*, "could reasonably have sensed the peril of prosecution." That is sufficient under the decisions of this Court.

D. The same considerations apply to the identification question, *Who?*, asked after petitioner had admitted knowing numbers writers, or men who are in the numbers business, around his place of business (R. 5a-6a). He had

earlier been asked whether he had met Willie Weisberg and Cappy Hoffman around the same address (R. 3a)—and these two were the Weisberg and the Hoffman of *Hoffman* v. *United States, supra.*[1]

The same reasons that were held to justify Hoffman in refusing to answer as to Weisberg justify this petitioner, in the present setting, in refusing to answer *Who?* the numbers writers were. Nor is the Government on sound ground when it attempts to distinguish the *Who?* question here, said to involve only acquaintanceship, from the similar question asked in *(Patricia) Blau* v. *United States,* 340 U. S. 159, where, according to the Government, "the matter concerned a clandestine, conspiratorial association." U. S. Br. 17; see also U. S. Br. 51-55. For here the prosecutor had specifically announced that he would avail himself of the Federal conspiracy laws to strike at numbers (R. 196a). The newspapers had reported (R. 197a) that "Goldschein himself stressed the importance of 'conspiracy' * * *"—and petitioner's fear of incrimination rested in part on what he had read in the newspapers (R. 132a, 176a, U. S. Br. 8, note). In that setting, surely, "Petitioner could reasonably have sensed the peril of prosecution for * * * conspiracy." *Hoffman* at 488.

E. The Government says (U. S. Br. 48), "It would be difficult to read the record here and not realize that everybody knows that petitioner is in the numbers business." Does not this statement come perilously close to flouting the statutory policy (18 U. S. C. [Supp. IV] 3481) that no adverse comment shall be made when the privilege against self-incrimination is invoked? *Cf. Bruno* v. *United States,* 308 U. S. 287.

---

[1] See 341 U. S. at 488 (Weisberg was a fugitive from justice); *id.* at 489 (Hoffman had a criminal record extending over 20 years); and see the record in that case, R. 11-14, No. 513, Oct. T. 1950.

II

The Government devotes nearly twenty printed pages of argument (U. S. Br. 62-81) to establishing what petitioner concedes at the outset, *viz.*, that Grand Jury minutes and papers in the files of Government offices are normally not subject to disclosure.

The issue here is wholly different. The issue here is whether, when the Government prosecutes an individual for the criminal contempt involved in refusal to answer questions, claimed by him to be incriminating, it may continue to assert the usual privilege attaching to such documents when he needs them to establish his defense. By asserting the privilege in these circumstances, as it does, the Government is prosecuting an individual while simultaneously denying him the right to defend. We should have supposed that such a practice would be so obviously condemned by the most elementary considerations of fairness implicit in the concept of Due Process of Law that it would be unnecessary to invoke authority in support of such condemnation.[2]

It is suggested by the Government that petitioner's request for the minutes was a mere "fishing expedition" (U. S. Br. 70), and his application for the prosecutor's file "a broadside request" (U. S. Br. 80). The short answer

---

[2] See cases cited at Pet. 23-24, notably *United States* v. *Zwillman*, 108 F. 2d 802 (C. C. A. 2), and *United States* v. *Remington*, 191 F. 2d 246 (C. A. 2), certiorari denied, March 24, 1952 (No. 387, this Term). The Government attempts (U. S. Br. 72-74) to distinguish the *Zwillman* case, by asserting that its language could be more narrowly construed. We think it sufficient to point out that it was employed by a meticulously careful judge (A. N. Hand, J.), speaking for colleagues neither given to nor tolerant of loose language (Swan and Clark, JJ.), and that what was said there may accordingly be taken at full face value.

The Government says nothing as to the ruling in the *Remington* case dealing with its duty to furnish the grand jury minutes (191 F. 2d at 250), doubtless because there is nothing it can say.

is that these objections are afterthoughts, and that both the Government's objections and the trial judge's rulings in the district court relative to the furnishing of the documents sought were based on a denial of petitioner's right, not on any asserted infirmity in the form or scope of his request (R. 52a-54a; for the pre-trial objections and rulings, see R. 99a-101a, 109a-111a, 147a-148a, 149a-152a).

Finally, the Government says (U. S. Br. 70-71), "Nothing in the grand jury minutes could have added substance and concreteness to the claim of danger." This statement, obviously, begs the question. Significantly enough, in a related contempt case which involved the same grand jury, the same prosecutor, and the same district judge (*United States* v. *Singleton*, 193 F. 2d 464 (C. A. 3), pending on defendant's petition for certiorari, No. 666, this Term), the court below, in affirming the conviction, examined and considered the government's file and the grand jury minutes, and indicated its opinion (193 F. 2d at 468) that the trial judge should have considered those documents also, "in the liberal view of the Hoffman decision." No such examination was made here, no such consideration was given here—although this case was remanded for reconsideration in the light of *Hoffman* (341 U. S. 944; R. 244).

The rulings below under the present heading are thus erroneous even on the face of the *Singleton* decision in the court below. And, at the very least, in the absence of a disinterested examination, petitioner is certainly not bound by the statement in the Government's brief as to what the papers he requested in order to establish his defense might or might not show.

III

The remaining questions in the case are consequences of the material—and disturbing—variances between what is recited in the formal judgment and commitment (R. 198a-201a) and what actually appears in the record of trial. The basic discrepancy turns on the circumstance

that whereas the presentment of the grand jury alleged a refusal to answer four questions before the grand jury in violation of 18 U. S. C. 401(1) as well as a deliberate disobedience of an order of the district court to answer those same four questions in violation of 18 U. S. C. 401(3), see R. 8a, in respect of which, after trial, the judge made a general finding of guilty (R. 65a), the formal judgment and commitment (R. 198a-201a) omitted all reference to the first unanswered question, *Are you in the numbers business now?*, and also omitted all reference to the refusal to answer questions before the grand jury; it set out only a disobedience of the order of the judge to answer the three remaining questions. See Pet. 11, 18.

A. Our statement (Pet. 21) that "the sole emphasis at the trial was on petitioner's alleged violation of 18 U. S. C. 401(1)" is challenged by the Government. U. S. Br. 57, n. 19. But the record sustains petitioner's contention; here are the relevant excerpts:

> THE COURT: * * * Mr. Greenberg, the Grand Jury has returned a presentment against you in which the presentment alleges that five questions were asked which you refused to answer. (R. 10a.)
>
> * * * * *
>
> I am just going to ask him now whether he refused to make these answers in the Grand Jury room * * * (R. 11a.)
>
> * * * * *
>
> The third question asked you before the Grand Jury was; the question that you refused to answer * * * (R. 11a.)
>
> * * * * *
>
> Now, those questions were asked you in the Grand Jury and you have refused to answer them, is that correct?
>
> (Mr. Greenberg at the bar.)
>
> MR. GREENBERG: Yes, sir. (R. 13a.)
>
> * * * * *
>
> THE COURT: * * * Now, you say those are the questions you were asked in the Grand Jury room? R. 14a.)

Up to this point there is not a word about any order of the court, nor a syllable of inquiry regarding questions which the witness was required or ordered or directed by the court to answer. At the trial, the transcripts of the pretrial hearing were introduced (R. 14a-15a), but these contain only two rulings, and neither is shown to have been made in petitioner's presence (R. 231, 146a). No other evidence of any order by the court was introduced. After the evidence was in, the trial judge said (R. 65a),

> I have gone over this, Mr. Greenberg, and I adjudge you in contempt of court, and I am now willing to and will ask you these questions again and give you an opportunity to purge yourself, if you want to answer. If you don't, I am ready to impose sentence. Do you want to answer?
>
> Mr. Witkin: We take the same position we have taken before, may it please Your Honor.

Again, not a word about any order to answer. In the formal judgment, however, the foregoing was embellished to read (R. 201a):

> And it further appearing to the Court that on the 8th day of November in the year 1950 this Court gave the said witness, Irving Greenberg, another opportunity to answer the said questions and he, through his counsel, stated in open court that he would not obey the Order of this Court and answer the questions which the Court directed him to answer as hereinabove set forth, thereby thwarting the investigation of the said Grand Jury and obstructing the administration of justice.[3]

---

[3] The Government's position seems to be that although counsel's answer, "We take the same position as we have taken before" is equivalent to a deliberate flouting of a judicial order by the client (U. S. Br. 62), so that the client must bear the burden of his lawyer's views, the client is not entitled to avail himself of any aspect of a claim of privilege made by his counsel in the course of argument. See U. S. Br. 53, n. 18. The obvious thread of consistency here is that the invocation of the constitutional privilege must be discouraged because (U. S. Br. 65-66) "it represented an interference with legitimate investigative efforts."

It follows that petitioner was correct in stating (Pet. 21) that all the emphasis at the trial was on the refusal to answer questions and not on a disobedience of orders to answer.

B. The foregoing review of the record documents petitioner's assertion (Pet. 19) that "the record shows neither proof of any order by the district court, nor of any disobedience of such an order." The Government's contentions to the contrary (U. S. Br. 60-62) rest in part on the view that petitioner's counsel knew that the judge had made a ruling, in part on the circumstance that 18 U. S. C. 401(3) punishes disobedience of a court's "rule", and in part (U. S. Br. 62, n. 23a) on the recitals in the judgment which, as we have shown, do not accurately reflect what is shown in the record.

Petitioner was not charged with disobeying a "rule" of court. The presentment alleged (R. 4a) that the court "ordered [petitioner] to return before the Grand Jury and answer the said questions which he had refused to answer," and (R. 8a) that petitioner—

> has willfully, deliberately and contumaciously disobeyed and resisted the lawful order and command of this Honorable Court by willfully and deliberately refusing to obey the Order of this Court to answer before the Grand Jury the aforesaid questions.

In other words, the allegation was that petitioner willfully disobeyed the direct command and order of the judge that he answer questions before the grand jury. We submit that the record of the contempt trial (R. 10a-71a), the pertinent portions of which we have set out above, pp. 8-9, fails completely to show the disobedience which was charged in the presentment.

C. The Government now argues (U. S. Br. 59) that "even if the oral finding did find petitioner in contempt in every respect as charged in the presentment, the omission in the formal judgment of some of the specifications em-

bodied in the oral pronouncement was not detrimental to him, but rather to his benefit, for such omissions constituted, in effect, a vacation of part of the judgment." Of course this rationalization is not supported by the record.

The basic issue at the pre-trial hearings revolved around the propriety of asking petitioner whether he was in the numbers business. As the trial judge said (R. 145a-146a),

> These repeated refusals to answer concern itself with the basic question "Are you in the numbers business?" I think that the continued getting around it in various or different variations with respect to it, since counsel have chosen to make their stand, I think they ought to go up on the question "Are you in the numbers business?" I don't understand the Government's position. Is it that you think eventually you are going to get the answer, Mr. Goldschein?
>
> MR. GOLDSCHEIN: Yes.[4]
>
> THE COURT: Don't you think we would be better off to get a ruling from the Circuit Court as to that main question rather than side issues? I don't mean by that in anywise to say that it isn't pertinent and necessary, but aren't we just getting around, if he refuses to answer that he is in the numbers business, you have the unlawful business specifically decided, and the Court will decide. Why don't you go up on the main issue as to whether or not he is in the numbers business?

That the question whether petitioner was in the numbers business remained basic until the end is shown by what the trial judge said just prior to sentence (R. 71a):

> THE COURT: No, I don't see much difference between this and the *Hoffman* case. It goes down to a question of whether a man can decline to answer when he is asked, "What is your business?" whether in the numbers business, the answer to which is violative of a state statute but does not give any right to predicate a claim for self-incrimination here.

---

[4] The importance of this particular answer, in the light of Mr. Goldschein's announced plan to strike at "numbers" through the federal revenue laws (R. 196a), is explained in the Appendix, pp. 16 *et seq.*, *infra*.

Undoubtedly it was within the court's power to vacate a portion of the judgment, although with the background of emphasis on the basic question whether petitioner was in the numbers business, it would seem more likely that, if such action had been intended, some explanation thereof would have been made. The circumstance that the record contains no explanation why all reference to petitioner's refusal to answer the basic question was omitted, together with the striking disparity between what petitioner actually said in court (R. 65a; quoted *supra*, p. 9) and what the formal judgment alleges he said (R. 201a; also quoted *supra*, p. 9), would seem very definitely to establish that "a vacation of part of the judgment" (U. S. Br. 59) was simply not under consideration when that judgment was signed.

D. The foregoing state of affairs introduces the next problem, *viz.*, whether the court below extended its review when considering this case a second time.

(i) In its first opinion, by dealing with the recitals in the formal judgment rather than with the record of trial, the court below passed over the alleged incriminatory character of the question *Are you in the numbers business now?* (R. 236). Our contention that, in its second opinion, the court below considered this question and held it non-incriminatory (Pet. 18-19) is challenged by the Government (U. S. Br. 13, n. 5; 59, n. 21), which, however, "does not rely upon petitioner's refusal to answer that question as a basis for supporting the judgment below" (U. S. Br. 13, n. 5).

In its second opinion, the court below said (R. 247) that "everything in the record suggests that the unlawful business in which [petitioner] might be engaged is the so-called 'numbers' business, an activity proscribed by Pennsylvania law and to which his constitutional immunity does not extend," citing *United States* v. *Murdock*, 284 U. S. 141.

From what source did the court below derive the foregoing suggestion if not from the unanswered question *Are you in the numbers business now?* And is not the reference to the *Murdock* doctrine proof positive that it considered that basic unanswered question non-incriminatory? To put these inquiries is to answer them. And, assuredly, the Government's present reluctance to rely on petitioner's refusal to answer the basic question (U. S. Br. 13, n. 5; 59) strongly suggests the true reason for the omission of that question from the formal judgment.

(ii) By a similar looking to the recitals in the formal judgment rather than to the happenings at the trial, the court below in its first opinion (R. 236) expressly passed over the question whether petitioner "in claiming his constitutional privilege under advice of counsel, as he did, could be convicted of a criminal contempt consisting of misbehavior obstructing the administration of justice in violation of Sec. 401(1), as charged in the presentment of the grand jury"; and it added (R. 236), "Certainly the assertion of a constitutional right if made in good faith on advice of counsel could hardly be described as such misconduct."

Here again, this view serves to suggest the real reason why all reference to the alleged violation of 18 U. S. C. 401(1) was omitted from the formal judgment. But since it is the formal judgment pronounced in court rather than the later formal commitment which controls, *Hill* v. *United States*, 298 U. S. 460, the finding of guilty in respect of refusal to answer questions before the grand jury must be considered, particularly since, as we have shown (*supra*, pp. 8-10) that was the only issue canvassed at the trial.

E. Apart from the discrepancies which we have herein outlined at length, it is apparent that the court below proceeded without regard to the record. Thus in its second opinion it said (R. 247), "In the absence of any contention

on Greenberg's part that the mere disclosure of his business, as such, may tend to incriminate him of a federal crime we regard the ruling of the Supreme Court in *Hoffman's* case as wholly inapplicable." But the very terms of the presentment showed that petitioner specifically and explicitly refused to answer the question *Are you in the numbers business now?* "because the answer I would give you will tend to incriminate me of a violation of the Federal Criminal Statutes" (R. 4a); and the same answer was in fact given in respect of the other business questions (see R. 173a-180a).

Does not such blind adjudication, do not the discrepancies between the record of trial and the formal judgment adverted to above, serve far more to "obstruct the administration of justice"?

IV

It is apparent from the Government's brief that its law officers are less concerned over the vindication of the constitutional command that "No person * * * shall be compelled in any criminal case to be a witness against himself" than they are over the effect which ungrudging compliance with that mandate will have upon investigation and prosecution. See U. S. Br. 56, 65-66.

We had supposed that what this Court in the *Hoffman* case had said of the constitutional provision in question (341 U. S. at 486) would have been dispositive of any such argument:

> This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Feldman* v. *United States*, 322 U. S. 487, 489 (1944). This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure. *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892); *Arrdstein* v. *McCarthy*, 254 U. S. 71, 72-73 (1920).

We agree with what the trial judge said just before sentencing petitioner here (R. 71a), "I don't see much difference between this and the *Hoffman* case." We submit, therefore, that this Court's decision in *Hoffman* requires a similar judgment of reversal in the case at bar.

CONCLUSION

For the reasons set out in the Petition for Certiorari, which serves as the petitioner's brief in chief, and for the foregoing additional reasons, the judgment below should be reversed.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
1009-1015 Tower Building,
Washington 5, D. C.,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

APRIL 1952.

[Please turn the page for the Appendix.]

APPENDIX.

Why the Prosecutor in this Case Wanted Petitioner to Admit Being in the Numbers Business.

Throughout its brief, the Government now seeks to minimize the danger to petitioner involved in his admitting being engaged in the numbers business. See U. S. Br. 37, 42-45, 47, and especially 48-49, *viz.*:

> It is also clear that, so far as petitioner is concerned, the admission that he is in the numbers business cannot provide any clues. It would be difficult to read the record here and not realize that everybody knows that petitioner is in the numbers business. Petitioner all but admits it himself. * * * He was not asked whether he is in the numbers business to give the government any leads.

Why, then, was the prosecutor so anxious to get an answer to that question, which the Government now contends is unimportant?

The record supplies part of the answer.

First, Petitioner's fear of self-incrimination under the federal criminal law was based, in substantial measure, on 26 U. S. C. 145(b), on the advice of his attorney, on his knowledge of what his answers to the challenged questions would be, and on what he had read in the newspapers (R. 131a-132a, 174a-176a; quoted in U. S. Br. 6-8, n. 3).

Second. The prosecutor had announced publicly (R. 196a) that "Even though there are no Federal laws regarding numbers, slot machines and other rackets, the probers will strike at such rings through the Federal revenue and conspiracy laws * * *."

Further (R. 197a)—

> A Justice Department spokesman said that as each witness is called, agents of the Bureau of Internal Revenue are prepared to produce income tax reports so that the jury can check his testimony.

Income tax violations would permit the Government to strike indirectly at racketeers whose activities are not covered by Federal criminal statutes.

Third. The prosecutor was particularly anxious to get an answer to the question whether petitioner was in the numbers business (R. 145a, quoted at Pet. 6; *supra*, p. 11; and see U. S. Br. 61). Indeed the whole course of the present proceeding reflects the Government's concern for an answer.

The apparent discrepancy between the Government's attitude in the record and the Government's attitude in its present brief is resolved by an examination of the cases dealing with prosecutions under 26 U. S. C. 145(b):

In order to sustain a prosecution under that section, it is first incumbent on the Government to establish that the defendant is engaged in an income producing business!

(i) The writing of able government specialists in the field establish this precise point. See Meyer Rothwacks, *Criminal Tax Prosecutions*, in 1 *Current Issues in Federal Taxation* (The American University Tax Institute Lectures: Matthew Bender & Co.) 269-289. Says Mr. Rothwacks (pp. 282, 283):

> In Section 145(b) prosecutions, the Government is required to prove receipt of income in excess of that reported. The Government is not required to prove the exact amount of corrected income as charged in the indictment; evidence of a substantial understatement of net income in the return is sufficient to support conviction [citing many cases].
>
> • • • • •
>
> The courts have sustained the Government's use of bank deposits in criminal tax prosecutions to establish taxable income where there is evidence of (1) periodic deposits in accounts which the taxpayer controls and (2) an income producing business. [Citing many cases, and quoting as follows from *Gleckman* v. *United States*, 80 F. 2d 394, 399 (C. C. A. 8), certiorari denied, 297 U. S. 709:

> "If it be shown that a man has a business or calling of a lucrative nature and is consistently, day by day and month by month, receiving monies and depositing them to his own uses, there is most potent testimony that he has income, and if the amount exceeds exemptions and deductions, that income is taxable."]

Writing a few years later, Mr. Rothwacks went on to elaborate (*Problems in Criminal Tax Prosecutions*, in 3 *id.* 297 *et seq.*, at 310-311):

> **Proof of Unreported Income by Circumstantial Evidence.**
>
> • • • • •
>
> The income, if any, in net worth, is presumed to be net income, *if certain conditions obtain.* These conditions apply equally to an expenditure case. They are: (1) that there is evidence of a possible source or sources of income to account for the expenditures of the increases in net worth; and (2) evidence of a "starting point" • • •.
>
> A substantial amount of case law has already been developed in the net worth-expenditure field. Most of the decisions are recent. They all emphasize the requirements concerning a source of income and satisfactory exclusory evidence.
>
> Proof of source of income involves no unusual problems. It should be observed that although the Government must establish a source, there need not be any direct proof of income from it [citing *United States* v. *Chapman*, 168 F. 2d 997 (C. A. 7), certiorari denied, 335 U. S. 853].

(ii) The observations of the only non-Government text writer in the field are to the same effect. See Balter, *Fraud Under Federal Tax Law*, 280 *et seq.*. In discussing "Proof of Income" under the "Expenditure Method", Mr. Balter sets forth the first requirement as follows (p. 281):

> (1) In each instance, it must be established that the defendant was engaged in an income producing business (whether lawful or unlawful) so that it would be

reasonable to presume that he realized income during the period in question [citing *Schuermann* v. *United States*, 174 F. 2d 397 (C. A. 8), certiorari denied, 338 U. S. 831; *Gleckman* v. *United States*, 80 F. 2d 394 (C. C. A. 8), certiorari denied, 297 U. S. 709, *supra;* and *United States* v. *Johnson*, 319 U. S. 503].

It is therefore perfectly apparent (a) why the prosecutor, who had announced that he would strike at numbers through the revenue laws (R. 196a), sought to obtain from the petitioner's own lips an admission that he was engaged in another income producing business, (b) why petitioner's counsel advised that an answer to the business questions would be incriminating (R. 143a, 57a), and (c) why petitioner (R. 131a-132a, 174a-176a) invoked his constitutional privilege when pressed to answer.

The Government's present efforts to minimize the importance of the business questions accordingly bespeaks, at the very least, a lack of candor.

No. 461. GREENBERG *v.* UNITED STATES. Certiorari, 342 U. S. 917, to the United States Court of Appeals for the Third Circuit. Argued April 2, 1952. Decided April 7, 1952. *Per Curiam:* Judgment reversed. *Hoffman* v. *United States*, 341 U. S. 479. MR. JUSTICE REED and MR. JUSTICE BURTON dissent. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case. *Frederick Bernays Wiener* argued the cause for petitioner. With him on the brief was *Jacob Kossman*. *Max H. Goldschein* argued the cause for the United States. With him on the brief were *Solicitor General Perlman*, *Assistant Attorney General McInerney*, *Beatrice Rosenberg* and *John R. Wilkins*. Reported below: 192 F. 2d 201.